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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 583 584

WILLIAM BERNARD WERNECKE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION AND BRIEF.

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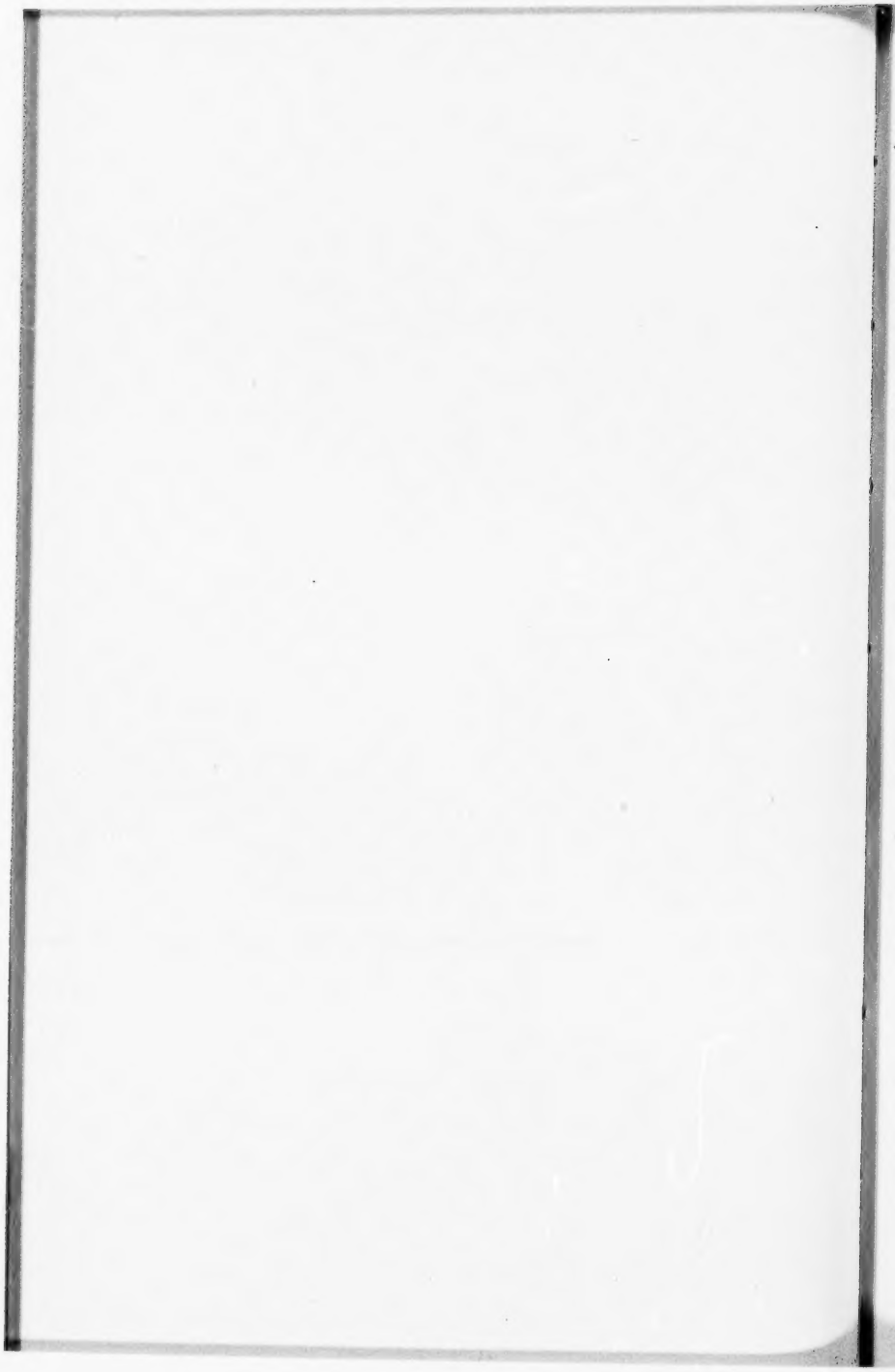

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In The

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943.

No.

WILLIAM BERNARD WERNECKE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, William Bernard Wernecke, respectfully shows to the Court as follows:

That he is a resident of the County of Cook and State of Illinois, and is a citizen of the United States, born at Chicago, Illinois, on February 21, 1907, of native born parents; that an indictment was returned to the United

States Grand Jury on November 13, 1942, and as returned consisted of three (3) counts, charging violations of the United States Selective Training and Service Act of 1940; that upon a verdict of guilty under the first and third counts, he was sentenced by the District Court for the Northern District of Illinois, Eastern Division, Honorable John P. Barnes, Judge presiding, to imprisonment for five years and was fined in the sum of Ten Thousand ($10,000) Dollars, and a similar sentence and judgment was entered on the third count of the indictment—the terms of imprisonment to run concurrently and the payment of the fine of Ten Thousand ($10,000) Dollars, on one count, to discharge the fine on both counts.

OPINIONS BELOW.

On appeal from said judgment of conviction, the United States Circuit Court of Appeals for the Seventh Circuit affirmed said judgment on November 5, 1943, and on December 2, 1943, denied defendant's petition for a rehearing. The opinion of the Circuit Court of Appeals rendered in this cause is reported as *United States* v. *Wernecke* (No. 8329) (Advance Sheet November 5, 1943), 138 Fed. (2nd) 561.

JURISDICTION.

This Court has jurisdiction to review this cause under Section 240 of the Judicial Code and Section 688, Title 18, Criminal Code and Criminal Procedure, and Rules 11 and 12 of Criminal Procedure of this Court (U. S. C. A.) Cumulative Annual Pocket part to Title 18.

SUMMARY STATEMENT OF MATTERS INVOLVED.

The Indictment.

Count I charges a neglect of the duty to make true and correct answers to a questionnaire as required by Section 311 of the Selective Training and Service Act of 1940 and

that defendant made false and untrue answer to questions contained in his questionnaire.

Count III charges that the defendant did evade and attempt to evade service in the land and naval forces by falsely assuming and pretending to become a minister of religion in violation of a duty with which he was charged by the provisions of the Selective Training and Service Act of 1940.

THE TRIAL.

The defendant filed a plea of not guilty and the cause was tried before the Honorable John P. Barnes and a jury. At the conclusion of the Government's case, the District Attorney withdrew Count Two of the indictment by leave of court.

The defendant then moved the court to strike Counts I and III, and also to find the defendant not guilty; the motions were denied and the defendant excepted.

Again at the close of all the evidence the defendant's motion to direct a verdict of not guilty was denied and the defendant excepted.

The Court charged the jury as follows:

> "If you believe from the evidence that any witness in this case has knowingly and wilfully testified falsely on this trial to any matter material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated, if you find it has been corroborated by other credible evidence or by facts and circumstances proven on the trial."

The defendant excepted thereto.

The jury returned a verdict of guilty under the first and third counts.

A motion for new trial was heard and overruled, as also was a motion in arrest of judgment, and exceptions were taken.

QUESTIONS PRESENTED.

The *fundamental* questions to be determined are three:

Whether Counts I and III of the indictment were sufficient in law and properly alleged all the facts and circumstances essential to constitut the offense defined in the statute.

Whether the impressions gained by the jury from allegedly improper evidence concerning events said to have occurred prior to the enactment of the Selective Service and Training Act of 1940; the Government's ridicule and disparagement of defendant's admitted status as a minister of religion allowed by the Draft Board and attempted discredit of his church and religious doctrine; the inflammatory and misleading arguments of the District Attorney to the jury; and the admission of improper evidence over objection, improper voluntary statements of the trial judge to the jury, and giving improper instruction to the jury, was fatally prejudicial to the defendant.

Whether the Government's attack by the District Attorney upon defendant's ordination as a minister of religion; its ridicule and derision of his religious belief and doctrines by testimony of Government witnesses, and inflammatory and improper argument to the jury; and conduct of the trial judge in admitting improper evi-

dence over objection, violated defendant's rights and liberties guaranteed to him in Article II of the Bill of Rights of the Constitution of Illinois (1870).

The *incidental* questions involved are:

Whether the defendant was a duly ordained minister of religion, was a question of law for the court in the first instance or a question of fact for the jury?

Whether a collateral attack can be made upon the church charter and its certificate of ordination in a criminal proceeding, and upon the record of the Selective Board classification?

Whether the court erred in instructing the jury that they might disregard the testimony of any witness testifying falsely to any matter material to the issues of the case except insofar as it was corroborated by other credible evidence and facts and circumstances proven on the trial without further instructing what facts were material to the issues?

Whether it was error for the trial judge to make a gratuitous and direct statement to the jury that defendant's counsel had made a motion for a directed verdict of not guilty for the defendant and that he was going to deny the motion and refuse the instruction?

Whether defendant falsely assumed and pretended to become a minister of religion?

Whether the argument of counsel for the Government was prejudicial to defendant and unwarranted?

Whether the search of defendant's home and seizure of his papers was incidental to his arrest or was a violation of his constitutional rights?

Whether the court should have granted a new trial?

Whether the regulations purporting to define what shall be considered "a duly ordained minister of religion," are each of them void for want of power in the person drafting such regulation to make them; and whether such regulations invade the field of the judicial?

Whether it was error to admit the testimony of witnesses to prove statements allegedly made by the defendant prior to the passage of the Selective Service Act?

STATUTE AND REGULATIONS INVOLVED.

The part of the Selective Training and Service Act of 1940 here involved is Section 311, Title 50, U. S. C. A., as follows:

"Sec. 311. Offenses and Punishment.

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other persons for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or knowingly counsels, aids, or abets another

to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act."

HISTORY AND FACTS OF THE CASE SHOWING QUESTIONS PRESENTED.

Petitioner William B. Wernecke was indicted in the United States District Court for the Northern District of Illinois, Eastern Division, at Chicago, Ill. Count I of the indictment charges in substance that he unlawfully, knowingly, wilfully and feloniously failed and neglected to make true and correct answers to the questions contained in his questionnaire executed on May 12, 1941, and Count III charges that he unlawfully, knowingly, wilfully and feloniously did evade *and attempt to evade* service in the land or naval forces by falsely as-

suming and pretending *to become* a minister of religion. (Our italics.) Petitioner pleaded not guilty and was tried to a jury. The following facts and circumstances in connection with the trial seem very pertinent and important to show the questions presented by this petition.

Facts Concerning Search and Seizure of Government's Exhibits 17 and 18.

The Government offered in evidence Government's Exhibits 17 and 18 which were some Moody Bible Institute letterheads and envelopes. They were objected to on the ground that they had been seized in an unlawful search of defendant's home at the time of his arrest. The court conducted a preliminary hearing and overruled the objection. On the hearing these facts were shown:

On September 5, 1942, a group of F.B.I. officers about 10 o'clock in the morning came to 6250 North Wayne Avenue, the home of the defendant, and rapped at the door of the porch in the rear of the third apartment which had canvas around it with a screen door. The exact number of officers was not stated. The defendant said there was about ten or eleven. Defendant Wernecke asked who it was and being informed that it was the F.B.I., defendant opened the door. He was told they had a warrant for his arrest. He did not resist, was immediately handcuffed, and a few minutes later the warrant was read to him.

P. V. Robe, the F.B.I. officer in charge, said that he and another officer passed on into the house proper. There, his authority to search was questioned by the mother of defendant, and he testified:

"I told her we had authority incidental to the arrest of the defendant Wernecke in that house" (Rec. 40).

The court ruled the documents admissible.

The witness then told the jury that Exhibits 17 and 18 were found in defendant's home at the time of his arrest and that at that time he had a warrant for defendant's arrest.

Defendant renewed his objections to the exhibits, they were overruled and the documents were admitted in evidence.

The Government showed the witness Ella Powers was a Clerk of the Selective Service Board No. 2 at Libertyville, Lake County, Illinois; that she had jurisdiction and control over the selective service file of the defendant William Bernard Wernecke. That she took care of the mail and brought before the board anything that might change the classification of a registrant and all such matters were put in the file and kept there and that that was done in this instance. She produced the defendant's questionnaire (Tr. 7, 8).

Government's Exhibit 2.

Government's Exhibit 2 is the selective service questionnaire of the defendant Wernecke. It is stated in the questionnaire that the defendant resides at 600 Waukegan Road, Lake Forest, Illinois; that he was born at Chicago on January 20, 1907; that he is white and a citizen of the United States; that he is afflicted with partial deafness, myocardial damage, intestinal disorders and that he is not an inmate of an institution; that he was then managing a farm for his mother, who resided

at 6250 Wayne Avenue, Chicago, whose business was property management and horse breeding and that he was engaged in assisting in property management; that he had farmed for eight years and was responsible for the operation of the farm on which he worked, the principal stock on the farm being 40 acres of alfalfa, 1 acre of potatoes, 10 acres of oats, 10 horses, 12 dairy cattle; that he was single and had never been convicted of treason or felony. The questionnaire as filled out states that the defendant completed eight years of elementary school and four years of high school; that he had three years in study of liberal arts at Central Y. M. C. A. College, one year of study of Christian Evidences in Moody Bible Institute, six months in study of religion at Christian Ministry College. He states:

> I am a minister of religion. I do customarily serve as a minister. I have been minister of the Allied Christian Management Army since April 27, 1941. I have been formally ordained. My ordination was performed April 27, 1941, by Fred Simpson Brown, who was the ecclesiastical official performing the ordination at Chicago, Illinois. I am attending the Moody Bible Institute Christian Ministry College which was established before September 16, 1939, and is located at Chicago. I claim exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors because I am conscientiously opposed by reason of my religious training and belief to combatant military service and noncombatant military service. In view of the facts set forth in this questionnaire it is my opinion that my classification should be Class 3 and 4. I believe that my induction should be deferred according to the law because I am an ordained minister and at present a theological student.

The affidavit to the questionnaire reads:

> "I, William B. Wernecke, do solemnly swear that I am the registrant named and described in the foregoing statements in this questionnaire, that I

have read the statements made by and about me and that each and every such statement is true and complete to the best of my knowledge, information and belief."

The affidavit is sworn to on May 2, 1941, before a notary public.

Action By Local Board.

The local board classifies the registrant in Class 4, Subdivision D, by the following vote: Ayes 3, Nays None. May 13, 1941. (Signed) John P. Casperson, Member.

The following statements are attached to said questionnaire:

(Statement 1)

Statement to Explain Reason for Expecting to Be Placed in Class 3.

My family consists of my mother age 54 years, a widow for 29 years, and myself. She maintains a home for herself in Chicago where I spend some of my time, to keep her company and assist her in taking care of some pieces of property she has title to. On account of their all being old they seem to need considerable attention. I have made my home on farms she has operated for the past eight years and have acted as manager.

My mother had an accident 7 years ago in which her feet were badly injured. She had varicose veins for years and although they were treated quite successfully her limbs still give her trouble. Because of these two conditions she cannot be on her feet much.

While she does not depend upon me for financial support, it is necessary that I attend to the repairs and collect rents or the property would be non-income bearing and a complete capital loss to us.

(Statement 2)

Physician's Statement.

May 7, 1941.

Mr. William Wernecke—Dr. Corrao.
Rate 60-80 per minute.
Normal sinus mechanism.
Normal axis deviation.
P wave is upright in all leads.
P-R interval is 0.19 second in duration.
QRS complex is slurred in all leads.
QRS interval is 0.04-0.07 second in duration.
low voltage is present.
QRS interval is 0.04-0.07 second in duration.
ST interval is isoelectric in all leads.
T wave is practically isoelectric in leads 1 and 2; upright in lead 2.
Companion chest leads tend toward coronary type.
Comment:

The above graphic alterations are indicative of Myocardial Damage, with considerable Myocardial Exhaustion.

Another record, after proper interval, for comparison, would be of value.

(Signed) J. Bailey Carter,
M. D.

(Statement 3)

To Whom It May Concern:

Mr. William Wernecke has been a patient of mine for six years. He has otoschlerosis of his right and left ears and his hearing is about 20% in each ear. He has a tendency to severe colds, sinuitis in both frontal and maxillary sinuses.

Because of his age and present physical condition I believe he should be deferred. He is still under my professional care and should report to me every few weeks.

Sincerely,
(Signed) Garland F. Pfeiffer,
D. O.

Subscribed and sworn to before me this 10 day of May, 1941.

Albert Millens,
Notary Public.

(Tr. 8-13.)

Mark Neville, a member of Selective Service Board No. 2 of Lake County, testified that the questionnaire of the defendant was before the Board and that from the answers made by the defendant he was classified as 4-D, as an ordained minister or divinity student of a recognized divinity school; that he did not see the defendant prior to November 13, 1942, with regard to the submission of any evidence or request for re-classification. On cross-examination he testified that the classification is determined from the information contained in the questionnaire unless the Board saw fit to require additional information; that there was nothing in the classification that required the Board to seek additional information and *that the Board voted to put the registrant in Class 4-D* (our italics) as a minister of the gospel, which was also the classification pertaining to theological students; that the questionnaire was filed May 12, 1941; that under the law the Board could have placed the defendant in Class 4-D either as a minister or theological student (Tr. 14-16).

Evidence Concerning Intent.

Raymond Joseph Healy testified for the Government:

Mr. Finn: We restrict the testimony of Mr. Healy to the issue of intent under the third count of the indictment and for that purpose alone.

The witness Healy testified that he first met Wernecke in 1939 and after that saw him on an average of once a week from January of 1939 until about September, 1940; that he was at Mr. Wernecke's farm; that he dis-

cussed the subject of induction into the armed forces with Mr. Wernecke in 1940 out on the farm. *Over objection* the witness was permitted to testify that the defendant said that we National Socialists must do something because due to the war and events in Europe they would not be able to call meetings and have gatherings under the old name and that they must find ways and means of preventing induction into the armed forces of this country of our brother National Socialists; that the defendant Wernecke said that they were going to organize a church; that we National Socialists must organize a church and being in the church and becoming ministers within that church we would be prevented from being inducted into the armed forces of our country; that that statement was made in July, 1940; that at a later date he had another conference with the defendant Wernecke which he stated was in August, 1940, and that Wernecke there said he was going to organize a church and that by organizing a church he as minister and those who joined his church would automatically become ministers and would not be inducted into the armed forces; that he saw Wernecke again in September, 1940, and that Wernecke said at that time that he had made up his mind that he was going to go ahead with the church that he had in mind. On cross-examination Healy stated that he was back in Chicago since the fall of 1941; that prior to that time he had lived in the City of Miami, Florida, about eleven months and prior to that time had lived in Chicago; that while in Chicago he was editor of a paper called the Irish Weekly and also known as the "Key"; that at the time that Wernecke had said to him that he was going to organize a church he talked about going back to the church that he had fallen away from; that today he is back in his own church; that Wernecke discussed religion with him throughout the period

of time that he knew him; that he was then employed as a defense worker in war work and was violently anti-Nazi.

Irma Strope, a witness for the Government, testified that she and her husband had been employed by the defendant Wernecke and his mother on the farm; that she went to the farm in September, 1938, and lived there until April, 1939, with her husband; that the defendant Wernecke came to the farm on week-ends and sometimes during the week and during that time she had discussions with Wernecke on the subject of religion; that she had those discussions about ten or twenty times; that Wernecke said he did not want she and her husband to go to church; that religion was just a theory, that it was something to believe in.

The Witness: He also stated that Hitler had no religion.

Mr. Smith: I object if the court please.

The Witness: Neither did he.

Mr. Finn: I think that is responsive.

The Court: Overruled.

The Witness: He stated Hitler had no religion and that he did not believe in it either; that there were other discussions on that general nature on the subject of religion ten or twenty times.

Mr. Smith: I move the testimony of the witness be stricken as not in any way tending to prove anything in this case.

The Court: Overruled (Rec. 46-49).

Motion for Directed Verdict of Acquittal.

At the close of the Government's case the defendant moved for a directed verdict and that the jury be so instructed. The motion was argued and the Government withdrew Count 2 (Rec. 51).

Motion to Strike the Indictment.

Also counsel for defendant moved to strike Count I and Count 3. The motion was denied and defendant excepted (Rec. 52).

Defendant's Exhibit 5.

Certificate of ordination of William Wernecke effective April 27, 1941, as a minister with assistant minister status. The certificate states that the defendant Wernecke was duly ordained as a minister and priest of God, assistant minister status in regular services under Allied CMA Christ Church I, Inc., of Chicago, on Sunday, April 27, 1941, effective as of April 27, 1941, and duly assigned to duty and ministry service as assistant minister of Christ Church II, Inc., of Chicago, under the direction and jurisdiction of the Bishop of Chicago Diocese. Signed by Fred Simpson Brown, Minister, Bishop of the Chicago Diocese, and Recorder of the Supreme Council Allied Christian Management Army, Inc. (Rec. 72.)

Defendant's Exhibit 6 (Rec. 95) is a certified copy of affidavit amending the charter of incorporation of Allied Christian Management Army filed in the Recorder's Office of Cook County, Illinois, on December 31, 1940. The affidavit is by F. Simpson Brown, Minister in Christ Service and Recorder of the Supreme Council, who states at the annual meeting of the Allied Christian Management Army—Supreme Council held in Chicago November 17, 1940, in accordance with the Canon and By-Laws, he is directed to give public notice that the charter or affidavit of incorporation recorded in the Recorder's Office of Cook County on July 15, 1939, is amended in this that the Regent M. Rev. Hidgeway for

reason of advanced age, resigned all offices and retired effective November 17, 1940, and that the M. Rev. (Paul) E. Richter as Regent Presiding (or Arch) Bishop was duly confirmed for life as Trustee-Sole and Administrator upon which office he entered on November 17, 1939, with powers and duties of Trustee-Sole in all matters pertaining to properties and contracts and administration of secular affairs and subordinate churches and groups as defined in the Canon.

Signed and sworn to by F. Simpson Brown, Recorder (Rec. 95-97).

Defendant's Exhibit 7.

Defendant's Exhibit 7 (Rec. 97) is a certified copy of affidavit of incorporaiton of Allied Christian Management Army originally named The Allied Churches of Christ sworn to on July 15, 1939, and filed for record in the Recorder's Office of Cook County on that date. The affidavit testifies to the fact that a duly convened meeting was held at Chicago on September 26, 1938, by the "College of Councilors" and Bishops and the Trustee of the Allied Christian Management Army originally named the Allied Churches of Christ and at that meeting (His Excellency The Most Reverend) Earl Paul Ridgeway was duly appointed Trustee-Sole of the (System of) Allied Christian Management Army and his appointment confirmed unanimously. The affidavit contains other matters of a historical nature showing that the church was founded in America in 1916.

Sworn to July 15, 1939, by F. Simpson Brown, Asst. Recording Secretary, Supreme Council, Allied Christian Management Army.

Defendant's Exhibit 8.

Ordination certificate of William B. Wernecke, defendant (Rec. 101), dated March 23, 1942, over the signature of church officials, states that the defendant is duly ordained a minister and priest of God in full rank; states that whereas the defendant was duly examined and entered as a student (minister) chaplain in Christian Ministry College of the Allied Christian Management Army that is the Episcopal Evangelical Church (also written Evangelical and Lutheran Episcopal Church) and awarded proper credits for the several years of prior education and training for ministry service as duly evidenced before the board and has continued his examination and training as aforesaid for approximately one year and that whereas he was duly ordained in April, 1941, and assigned by The Diocese Bishop as assistant minister and from time to time transferred to serve other churches to broaden experience by actual service in which he has established acceptable service record therefore having duly given his vows of ministry and consecration to Christ's service he was and is duly ordained a minister and priest of God in full rank authorized to solemnize marriage and perform all other duties and service incident to the privilege as a minister, the ordination being effective as a full minister March 23, 1942. Signed by (The M. Rev.) Paul E. Richter, (The Rt. Rev.) Fred Simpson Brown, Executive Bishop, Adjutant General, (The V. Rev.) Martin Carlson, Dean, Assistant Bishop—Minister—C.M.C. (Rec. 101-102.)

Argument to Jury By District Attorney Finn.

You heard Mr. Wernecke testify, and if I may say so, I think he is perhaps one of the most agile witnesses, mentally agile witnesses that I have ever heard on the witness stand—a fencer from the word go.

The questionnaire in Series III recites as follows: Name of educational school, college or university. And then, Central YMCA, Moody Bible Institute. Course of study Christian Evidences. Length of time attended, one year.

That was sworn to by Mr. Wernecke on the 12th day of May, 1941.

Now, what were the facts on that day as far as the correspondence school was concerned? Mr. Wernecke went down there on the first day of November of 1940, two weeks after he had been required to register, and if I may say so, in accordance with the preconceived plan which was testified to by Mr. Healy on the witness stand here, he went down there to the Moody Bible Institute and applied for this correspondence school. He was given all 54 lessons to fill out (Rec. 110). About four and one-half months later he had returned one of the 54 lessons. That was the extent of his education at the Moody Bible Institute. If you could consider him in any portion a student, he was one-fifty-fourth of a correspondence school student in one course at the Moody Bible Institute on the 12th day of May, 1941.

Now, you remember when he was on the witness stand how he squirmed when we got down to the question as to what he knew in his heart on the 12th day of May, 1942. Ladies and gentlemen, under the evidence there cannot be the slightest doubt but that this man deliberately lied when he filled out that questionnaire saying he had been a Moody Bible Institute student in Christian Evidences for a period of one year at that time. And what is his purpose? Why, you can see it written all through this questionnaire. He is attempting to evade the draft. There cannot be any other purpose.

He says also in that questionnaire that he had been a member or a student at the Christian Ministry College, studying religion for a period of six months. Well, I don't know what you thought about this institution. It was a most peculiar place. It might be termed a college "*in futuro*," in the future, as Mr. Carlson said. This was all on paper. These were the plans that we had. There wasn't any faculty, except Mr. Richter, who was called Regent of the college. It had no enrollment. They evidently kept no records (Rec. 111). They didn't have any examinations. They didn't have any graduations and they didn't have any home work.

They didn't have anything.

It had a dean, who said he did not want to be a dean. A bishop who did not want to be a bishop. A regent evidently a self-appointed regent who was the whole cheese out there.

If you doubt that, just take a look at these various documents which have been presented into evidence by the defense themselves. You know, I feel sorry for two people in this case. One was the old Reverend Carlson, Reverend Carlson, seventy-eight years old, who was evidently a poor, sweet, deluded, nice old man, evidently put there as a front by Wernecke and Richter. I felt sorry for him and I felt sorry for Mr. Smith when he was sort of stalling for time a little bit yesterday by reading that document that he had to read into evidence. Why, they had more titles and more high sounding words and more whereases than any legal document that I have ever seen. Now, they accuse lawyers of being profuse in language, but you will never see anything better than this. Read through these documents if you will, that they are presenting in evidence, and you will come to the conclusion, the undoubted conclusion that they were

written by the same man, and there can't be the slightest possible doubt. It is all the same style. It is all Richter, and it is all a front and a fake.

What did the gentleman have to say about this? Well, here they have this. They had an office up at 82 West Washington Street, and in that office, which was, as I think, as he testified, 5 by 8 feet. They had the headquarters of the Allied Christian Management Army, the Allied Consumers Mutual Association, the American Rangers, the George Washington Bodyguards, the Christ Evangelical Lutheran Church, one, two, three and four. They had the headquarters of a grocery store, the Grocery Consumers Company, the Christian Ministry College, all of this office of 5 by 8, mind you.

I wonder if Mr. Wernecke, as he sits there in his subdued elegance, I wonder if he actually believes that an American jury, that you sitting there are so naive and simple as to believe for one moment after the evidence has been presented to you in this case that this Christian Ministry College was not intended as a front. I wonder if he actually believes that you people are so naive as to swallow that (Rec. 112).

Here, ladies and gentlemen, you know if it was not so tragic this thing would be comical, wouldn't it?

You know one of the perhaps most precious gifts within the power of the Creator to bestow upon the human being, and this has been true ever since this world was created, perhaps the most precious sentiment the most intimate feeling, the purest and finest strain in human nature ever since the beginning of the world is his belief in a god and a religion. And I say, woe to the man who will traffic, deliberately traffic in religious

sentiment and religion for the avowed purpose of avoiding the service that he owes to his country in time of war.

I wonder if he believes, or if Mr. Smith believes all this abracadabra, this creating of ministers, who have no more qualifications of a minister than I have or anyone else has, who has ever had any training in that regard, I wonder if he believes for a moment all this abracadabra is fooling you.

You know I have always considered, and I think most people do consider a man of God as a person somewhat set apart from the rest of us. I don't care what religion you may follow, whether you be a Catholic or a Protestant, or what Protestant faith you belong to, or whether you belong to no particular faith. I think all of us have always set a man of God apart.

I know in most religions before a man can be ordained a minister of God or a priest, he goes through a long and arduous training in schools, colleges, theological schools, to equip himself so that he may be put upon that pedestal where we have a right to place him.

And what have we here, bishops, regents, ministers, created with just a flash. Mr. Brown was in that. He was a—was he a real estate agent? Oh, he was a printer. Never had any training in the ministry. So he goes up there, and they say, "You be the bishop and you sign the documents up there all prepared for you. You can go over and record them."

They take another man who has been a janitor, a chiropractor, and I don't know what all else, and he is a minister of the gospel, just by putting on a robe and

saying a few words in this 5 by 8 office. How the regent got to be regent I have not the slightest notion, but I say that this man as he sits there is a hypocrite (Rec. 113) if he tells you as he did on this witness stand that he was ordained by God some time when he was 21 years old, and that he has been preaching ever since, and that he has 100,000 people that he preached to.

I asked him, "Will you tell me just one place that you preached anywhere?"

And he said, "I don't have a pulpit."

I said, "Any place, any place at all."

Oh, he couldn't tell me one place, and 100,000 in his congregation. That is the extent to which a witness gets when he is lying under cross-examination, isn't it? Why, you couldn't believe any such thing.

I don't think it is necessary to review this evidence with you. I think the evidence showed that he was managing this farm and that he evidently had been very active in an organization known as the Bund because as admitted on the stand he was operating that stand or store known as the Aryan Book Store, disseminating propaganda. He was also disseminating Pelley literature at the same time that he was supposedly, supposedly and allegedly a minister of the gospel. Well, I am not going to extend that thesis at all. You people are people of common sense, and the Government is relying upon you to apply that common sense in this case.

I just want to say this in closing: We believe that the evidence has conclusively shown that he falsified every portion of that questionnaire which is material here, and that he did it deliberately; that he did it with intent to evade the draft, and that there can be no other

conclusion but that this ministerial garb is nothing but a cloak to evade the service that he owes to his country in the time of war and the service that thousands and millions of young men are going forth to perform every day, and going forth to meet what may be their death. That is the service that he owed to his country just as well as they did. That is the service that he has evaded by such actions as these (Rec. 114).

Argument to Jury By District Attorney Owen.

Now, Mr. Smith, whether intentional or not, ladies and gentlemen, overlooked what I think is one of the most important and significant facts in this case. You ladies and gentlemen will recall that Mrs. Strope, who worked for Wernecke in 1938 and 1939, testified from this witness stand under oath, and she was a God-fearing woman, ladies and gentlemen. *Her husband is in the army.* I believe that you know that she was sincere and an honest woman.

She testified, if you will remember, that as late as 1939, this defendant stated to her and her husband on many occasions that he did not believe in religion. And why didn't he believe in religion, ladies and gentlemen? Because Hitler did not believe in religion (Rec. 123).

Now, that statement was not denied by Wernecke in this case. That statement stands uncontradicted in this case. Now, do you think that Mr. Wernecke is a disciple of Mr. Hitler? Do you believe that Mr. Wernecke belonged to the German-American Bund and that he was interested in disseminating propaganda in this country through that Aryan book store as was testified to from the witness stand?

Mr. Smith: May I interpose an objection to this sort of argument, if the Court please? It is highly inflammatory and unfair and outside the realm of the prosecution. It is entirely void of anything that has to do with this case at all.

Mr. Owen: I am arguing the evidence, if the Court please.

The Court: It is all in evidence. It is upon the question of intent.

Mr. Smith: May I save an exception?

The Court: Yes.

Mr. Smith: I do not want to interrupt you.

Mr. Owen: I do not blame you for not wanting to interrupt me on that. Why didn't Mr. Smith ask Mr. Wernecke to deny that statement? It is in the affidavit of Mr. Wernecke what he said. If he didn't say it, why didn't Mr. Smith have Mr. Wernecke deny that? Well I will leave you to draw your own inferences. Maybe Mr. Smith, if he had asked that question and Mr. Wernecke denied that statement, we on cross-examination might have been able to develop something of interest to this jury.

Mr. Healy testified to practically the same thing. Mr. Healy testified he was at the farm. Did Mr. Wernecke deny that Mr. Healy was out to the farm. If Healy is no good, then Wernecke is no good. If Healy had some sort of a complex about propaganda and the things that he should not have done, a counsel would have you infer, then, Mr. Wernecke was certainly keeping bad company, and it certainly was not in keeping with his very, very religious training and his very, very religious conduct from the time that draft went into effect until he filed his questionnaire (Rec. 124).

Mr. Wernecke did such a good job in filling it out, that questionnaire, that he fooled the draft board. He fooled the draft board because he was classified 4-D. Counsel says, "Why don't the draft board call him in?

Why didn't the draft board notice that he just had been ordained a minister?''

I will tell you why, ladies and gentlemen. There were some answers in the questionnaire. He said he was a student at the Moody Bible Institute. If he was a student, theological student, a legitimate and honest theological student, the draft board had a right to still put him in 4-D. Wernecke was so anxious to go in the army, so anxious to be drafted and so anxious to go to the aid of his country, that he put these things in there to keep him out (Rec. 125).

Mr. Brown, I will admit he looked a little, he was a little reluctant. I will admit that he acted rather ashamed. Why shouldn't he be ashamed? Mr. Brown has come to realize, ladies and gentlemen, that he has been a party to defrauding the United States of America. Mr. Brown has come to realize that place was not what it seemed. He has come to realize that all through this picture, in this questionnaire, he has been a party helping this man evade the draft by claiming falsely to be a minister of the gospel. That, ladies and gentlemen, is why Mr. Brown was reluctant, and I do not expect you can in any way blame him for that conduct on the witness stand. We did not make Mr. Brown. We took him as we found him. Mr. Brown is a witness for the Government. We do not make our witnesses. We take them wherever we can find them. As I see it in here, there isn't anything to counsel's question or any reason why you should not believe him.

Don't worry about Mr. Richter. Mr. Wernecke didn't even deny Mr. Brown had ordained him on the 27th day of April. Counsel denies this and infers at least we

should have brought Richter in here. Why in Heaven's name would we bring Richter in here and put him on this witness stand? He couldn't prove our case for us. He had nothing to do with our case. He has been a pal of Wernecke's for twelve or fourteen years. Wernecke had been a visitor at his place. Wernecke had approved of those things that Richter stood for, a lot of other organizations that existed only on paper. You saw Wernecke testify here. You saw him here. Do you think that Mr. Richter or anybody else could fool Wernecke for twelve or fourteen years? Don't you know if Richter was a phony Wernecke would have found it out very soon, and if Wernecke was also a phony he would not have continued associating with him. Don't you know that to be a fact, ladies and gentlemen? (Rec. 126) That is just as true as anything I have said here today or any other time or any other lawyer said here.

They say, they intimate they couldn't find Richter. Well, one of their witnesses saw him three days ago. He was the Reverend Carlson. He saw Richter three or four days ago. That 79-year-old gentleman that was hardly able to totter around was able to go out and locate Richter. I don't think they would have a hard time to locate him and bring him in here if they thought he could have added anything to their side of the case. They did not want Richter in. They know we would have torn him to pieces on cross-examination. They did not dare to produce him. We did not want to produce him because he would add nothing to our side of the case. That is the answer to Richter.

When the Congress, ladies and gentlemen, designed this draft law in 1940, it was foreseen by them that we were going to be involved in this great war. Their fore-

sight was afterwards borne out by the attack on Pearl Harbor and the declaration of war which followed. Now, the Draft Act, ladies and gentlemen, was designed primarily for two purposes: First, that the Government might have an inventory of its manpower, and that is why all of us were required to register, old and young. They kept it within age groups, between the years of 20 and 65. That was very important. They wanted to know who could be used for active military service. They wanted to know who could be used for defense work or any other kind of work which might become important in the great struggle, in the war we are engaged in. The second basis for which the Draft Act was designed was in order to put certain men into the service and training so that when the day came we would have an army to meet the situation. That Draft Act was designed to apply to everybody, everybody. It was not made to apply to you, to you, and to me. It was made to apply to this defendant as well as anyone else (Rec. 127).

The Court: Ladies and gentlemen, we will recess at this time until 10:00 o'clock tomorrow morning. The Court will at that time instruct you in respect to the law applicable to the case.

Ladies and gentlemen, counsel has made a motion here for a directed verdict for the defendant. I am going to deny the motion and refuse the instruction (Rec. 128).

Prayer for Relief.

WHEREFORE, petitioner Wernecke by his counsel respectfully prays the issuance of an order granting the Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to the end that its judgment be reversed and for such other relief as to this Court shall seem meet.

LEO L. DONAHOE,
Attorney for Petitioner.

POINTS OF LAW RELIED ON.

I.

An Indictment Must Show Upon Its Face That a Crime Has Been Committed By the Defendant; the Offiense Must Be Shown By Facts Put of Record So the Defendant May Prepare for Trial and Have Protection Against Double Jeopardy and the Court May See Subject Matter to Be Adjudicated, Otherwise the Indictment Will Not Support the Verdict Thereon.

U. S. v. *Cruikshank*, 92 U. S. 542.

U. S. v. *Simmons*, 96 U. S. 360.

U. S. v. *Eisenminger*, 16 Fed. (2d) 816.

U. S. v. *Hess*, 124 U. S. 483.

Foster v. *U. S.*, 253 U. S. 481.

U. S. v. *Ruroede*, 220 Fed. 210.

II.

The Defendant Was Prejudiced Before the Jury By the Statements of the Trial Judge.

Argument, post.

III.

The Attorneys for the Government Were Permitted Over Objection to Make a Violent and Inflammatory Argument to the Jury Outside of the Issues of the Case.

Argument, post.

IV.

The Free Exercise and Enjoyment of Religious Profession and Worship, Without Discrimination, Shall Forever Be Guaranteed and No Person Shall Be Denied Any Civil (Or Political) Right, Privilege Or Capacity, on Account of His Religious Opinion, Is a Constitutional Endowment Given to Defendant-Petitioner By the Constitution of Illinois, and Such Was Invaded and His Liberty Jeopardized By the Conduct of the District Attorneys and the Trial Judge.

Constitution of the United States, Section I of Bill of Rights.

Constitution of Illinois, 1870. Article II, Bill of Rights.

Argument, post.

V.

The General Search of Defendant's Home and Seizure of Defendant's Papers in His Desk in His Bedroom at the Time of His Arrest on the Back Porch of the Dwelling House Were Unreasonable Acts and Violated His Constitutional Right to Be Free From Unreasonable Searches and Seizures.

Veeder v. *U. S.*, 252 Fed. 414.

U. S. v. *Kirschenblatt*, 16 Fed. (2d) 202.

U. S. v. *Lefkowitz*, 285 Ill. 452.

U. S. v. *Thompson*, 113 Fed. (2d) 643.

VI.

The Instruction Given By the Court to the Jury As to Disregarding the Entire Testimony of a Witness Who May Have Testified to any Matter Material to the Issues, Except As Corroborated, Was Error.

People v. *Wells*, 380 Ill. 347.

People v. *Flynn*, 378 Ill. 351.

VII.

The Exemption Extended By Congress to a Duly Ordained Minister of Religion Is Made to the Man Who Is Such and the Regulations Limiting That Exemption Are Void for Want of Power and As Invading the Judicial Field.

Sec. 305 (d) Selective Training and Service Act and Regulations.

Sec. 305 (c) (1) Selective Training and Service Act and Regulations.

Watson v. *Jones*, 80 U. S. 679, 728.

VIII.

The Court Erred in Admitting Testimony of the Witnesses Healy and Strope for Purposes of Proving Intent, Their Testimony Being of Statements Said to Have Been Made Prior to the Selective Service Act.

Argument, post.

ARGUMENT.

I.

An Indictment Must Show Upon Its Face that a Crime Has Been Committed by the Defendant; the Offense Must Be Shown by Facts Put on Record So the Defendant May Prepare for Trial and Have Protection Against Double Jeopardy and the Court May See Subject Matter to Be Adjudicated, Otherwise the Indictment Will Not Support the Verdict Thereon.

The trial court should have stricken Counts I and III of the indictment on defendant's motion at the close of the Government's case, and should have instructed the jury to find defendant not guilty. It overruled these motions (Rec. 51-52).

We contend that the indictment in this case is so defective in both Counts I and III that it will not support the conviction. Not one fact is pleaded in either count with sufficient particularity to inform defendant of the exact character of the crime charged. Both counts are void for want of certainty and failure to charge each and every element of the offense alleged to have been committed.

The rule is that it is necessary in an indictment setting forth a statutory offense to allege not only all the facts and circumstances essential to constitute the offense as defined in the statute but also to pursue the precise technical language of the statute in which they are expressed. This is for the purpose of enabling the defendant to prepare for trial and to secure him against

double jeopardy as well as to show the court that a crime is shown to have been committed (*U. S.* v. *Eisenminger*, 16 Fed. (2d) 816, 818); in short there is subject matter for adjudication.

The first count refers to false answers made to questions contained in defendant's questionnaire; but what questions were asked? What answers were made? What were the facts so the court could tell if there was a variance? They are not in the indictment. Was there a Selective Service Board? Was the questionnaire ever filed anywhere? Was it ever relied upon? Was defendant ever classified? Did the Board, if there was a Board, ever take any action on the questionnaire? Where was the Board located if there was a Board? Was it functioning in this district or some other district? Was the supposed untruthful statement something material to the purpose of the questionnaire?

If anything, Count III lacks even more essential allegations than Count I. The charges made that petitioner was subject to the Act and that he "did evade or attempt to evade" service by "falsely assuming and pretending to become a minister."

Nowhere in Section 311 of the Act may be found the word *attempt*.

There are no allegations of facts in Count III to support a legal conclusion that petitioner did evade service. The language of Count III only names the supposed crime instead of stating facts that constitute one. When and where the alleged false assumption and pretention to become a minister was made, to whom it was made, and in what manner and by what means it was accom-

plished. These essential allegations are wholly lacking in Count III and clearly violate the provisions of the sixth amendment to the Constitution of the United States requiring that "in all criminal prosecutions, the accused shall * * * be informed of the nature and cause of the accusation."

In *U. S.* v. *Cruikshank*, 92 U. S. 542, the court held:

> "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

The court then held:

> "The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them."

In *U. S.* v. *Hess*, 124 U. S. 483, the defendant was indicted for an offence described as "a scheme to defraud divers other persons" which the defendant intended to

effect by inciting such other persons to communicate with him through the post office. The defendant was found guilty and upon motion for new trial and in arrest of judgment the court was divided in opinion. The record was certified to the United States Supreme Court for an answer to the question whether the second count (on which only the defendant was tried) sufficiently described an offence and, if it were there, whether the defects or imperfections of the indictment could be aided and cured by verdict. The United States Supreme Court there held that the essential requirements constituting the offence of devising a scheme to defraud were wanting; that such particulars were matters of substance and not of form and that their omission was not aided or cured by the verdict. The court there held that to the general rule that it was sufficient to charge a defendant in the substantial words of the statute, without expansion, there was another fundamental rule to be observed. The court said, quoting rom *U. S.* v. *Simmons*, 96 U. S. 360:

> " 'To this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, although it may follow the language of the statute.' It accordingly held that, tested by the rules thus laid down, the second count was insufficient."

The court there held (124 U. S. 483, 488) that the indictment did not state an offense under the statute and that it was not aided or cured by verdict.

In the case of *U. S.* v. *Ruroede*, 220 Fed. 219, it appeared that a warrant had been issued in which it was stated that the defendant

"did conspire to defraud the United States"

and also stated that the acts upon which the information was filed were

> "Based upon an official investigation thereof, to disclose the nature of which would be contrary to public policy and would be injurious to the Government's case and the same will be presented in full at the hearing upon the complaint."

The accused appeared before the Commissioner and waived examination. He thereafter sued out a writ of *habeas corpus* asking his discharge on the ground that the complaint alleged no facts constituting a crime. The overt act alleged in the information was an interview between the defendant and another person. The court held that the information did not state a cause of action and discharged the prisoner.

The Third Count Has No Substance.

We think the case of *Foster* v. *U. S.*, 253 Fed. 481, is instructive inasmuch as the Act involved there bears great resemblance in type to the one here under study. The Act there involved was Section 33 of the Espionage Act. The groups of counts there charged violations of the Act in the very words of the statute: that defendants did "make and convey false reports and false statements with intent," etc.; "did cause and attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces," etc.; and did "obstruct the recruiting and enlistment service of the United States," etc. The trial court overruled a demurrer but ordered a bill of particulars. The defendants were convicted and on appeal the court held that no cause of action was stated and that the indictment could not be amended or have its terms enlarged by a bill of particulars. That a bill of particulars

may be allowed to dress out an indictment with details where it has within it facts that can be detailed; that a bill of particulars, not being the finding of the grand jury, cannot cure or supply the facts missing in the indictment. The judgment was reversed and the cause remanded with directions to sustain the demurrer. The same judgment is indicated here.

Because the indictment in both Counts I and III was barren of essential facts by means of which the criminal charges were committed and upon which the charges were founded, the Government simply named the crime and did not charge one. Since the indictment does not in substance charge the commission of a crime the motion of petitioner to strike Counts I and III should have been allowed, and the judgment of conviction should be reversed.

II.

The Government's Attacks Upon and Disparagement of Defendant's Ordination as a Minister of Religion and Its Ridicule and Derision of His Religious Belief and Doctrines by Improper Testimony of Government Witnesses, Inflammatory and Improper Argument to the Jury, and the Conduct of the Trial Judge in Admitting Improper Evidence Over Objection, Violated Defendant's Rights and Liberties Guaranteed to Him Under Article II of the Bill of Rights of the Constitution of Illinois (1870).

To support its vague charge in Count III of the indictment that defendant "did evade or attempt to evade" service by "falsely assuming and pretending to become a minister" the Government ridiculed petitioner's religious belief and doctrines and disparaged and attempted to discredit the petitioner's church and his ordination as

a minister of religion. These fatally prejudicial tactics were effected by improper testimony of the Government's witness Frederick Simpson Brown (Rec. 33-38); the testimony of the Government's witness Raymond Joseph Healy (Rec. 46-49); and the testimony of Mrs. Irma Strope, a witness for the Government (Rec. 49-51). During the examination of each of these three government witnesses, petitioner's counsel objected to the introduction of improper testimony upon questions asked by the District Attorney and each and every objection was overruled by the trial court.

Both the trial court and the Circuit Court of Appeals have overlooked and misconceived the intent and meaning of Section I of the Bill of Rights of the Federal Constitution providing that "Congress shall make no law respecting an establishment of religion or prohibiting a free exercize thereof", as well as the religious liberty guaranteed to petitioner under Article II of the Bill of Rights of the Constitution of Illinois.

Exemption is granted from military service to regular or duly ordained ministers of religion under Section 5 (d) of the Selective Training and Service Act. Petitioner was so classified by his local Draft Board. This case must test the question whether or not the Government has the power in a criminal proceeding under the Selective Training and Service Act of 1940, this petitioner's constitutional right and privilege to become a regular or duly ordained minister of religion, when pronounced and constituted to be so qualified by a lawfully organized and operated Church of God or group of persons who have complied with the laws of their domicile providing for the existence of religious bodies, for the purpose of Holy worship and religious instruction. Since Congress is

prohibited by the Constitution from making any law prohibiting the free exercize of religion, the Federal Courts may not prosecute petitioner in his desire "to become a minister of religion".

Petitioner Wernecke was a minister in truth and in fact, on May 12, 1941. He was ordained by Divine revelation when he was 21 years old in the year of 1928. At that time he founded a church bearing the name "Inspired Christian Church". On April 27, 1941, he was again ordained by a religious sect known as the Allied Christian Management Army, incorporated in July 15, 1939 under the religious corporations act of Illinois, affidavit of incorporation of this sect being filed in Recorder's Office of Cook County, Illinois—Doc. No. 12341307 in Book of Records No. 1234, Page 262. Later on March 23, 1942 he was again ordained to a higher rank of priesthood by the Allied Christian Management Army, the above mentioned religious sect. These facts appear in the record uncontroverted.

Whether his religion conforms to more generally known forms of religious worship, whether his religion is acceptable to the members of the jury which tried him; whether his religion conforms with the religions of the District Attorneys who made a frontal attack upon his religion, upon his claim to be a minister, upon his method of being ordained, upon the manner in which his church was conducted, upon his theological education, upon the number of members in his Church is not at issue in this case and should not have been considered by the jury.

It makes not one particle of difference whether his religion conformed with the opinion of the judge, jury or prosecutor or whether it was conducted in a manner they

liked or disliked, the fact remains—it was a religion, he was a minister, his Church had the right to exercise religion according to their own conscience, to select any man they wished to select as a minister of their religion. William Wernecke was not falsely assuming or pretending to be a minister when he signed his questionnaire in May 1941.

III.

The Impressions Gained by the Jury from Improper Evidence Regarding Events Alleged to Have Occurred Prior to the Enactment of the Selective Service Act of 1940 Were Fatally Prejudicial and in Violation of Petitioner's Constitutional Rights.

The government's ridicule and disparagement of defendant's status as a minister of religion allowed by the draft board in its attempts to discredit his religious doctrines and church; the inflammatory and misleading argument of the District Attorneys to the jury; and the admission of improper evidence over objection, improper statements of the trial judge before the jury and giving improper instructions to the jury were fatally prejudicial to petitioner, and in violation of his Constitutional right not to be deprived of life, liberty or property without due process of law.

In its zeal to convict petitioner upon the charge of "unlawfully, knowingly, wilfully and feloniously did evade and attempt to evade" service in the land or naval forces be falsely assuming and pretending "to become a minister of religion", the Government left no stone unturned to subject petitioner's Church, its personnel, its factual organization, its mode of worshiping God, and its ordination ceremonies to ridicule, derision, and scathing innuendo.

The testimony of Healy (Rec. 46-68) to the effect that Wernecke, before the effective date of the Selective Service Act, had declared that he proposed to form a Church and become a minister of the Gospel so he would not be drafted, was denied *in toto* by the defendant. Had the fair tactics of trial guaranteed to defendant under the "due process of law" provision of the Constitution been observed by the Government as the trial proceeded, can it be said that the jury would have accepted Healy's testimony "beyond a reasonable doubt" and convicted Wernecke? The jury had for its consideration the very weighty evidence that defendant's Church was founded in 1916, and was duly incorporated in July 1939, before the alleged conversation with Healy and prior to the enactment of the Selective Service Act. (Defendant's Exs. 6 and 7; Rec. 95-96). Wernecke had no part in the organization of his Church, and did not even know of its existence at that time, as shown by the record.

Not only by a frontal attack on the existence of the Allied Christian Management Army was the irreparable harm accomplished, but by every sly, shrewd strategem designed to instill into the minds of the jury that Wernecke's religion was a sham and a pretense, even though he had been regularly ordained according to its tenets as one of its chosen ministers and priests. The record reeks with these violations of Wernecke's rights to a fair and impartial trial. The testimony of both Healy (Rec. 46-49) and Mrs. Strope (Rec. 50) received over objection; stressing the Bund, Nazi, Silvershirts and Pelley ideas (Rec. 113-114, 123-124), trifling though they proved to be when calmly considered; in the Government's attorney's effort to convince the jury that even acquaintance with these organizations was alone sufficient to convict the accused; the inflammatory arguments to the jury by counsel for

the Government (Rec. 111-114); their boast that had Richter been put on the stand, "we would have torn him to pieces on cross-examination" (Rec. 127); the gratuitous side remark of the trial judge to the jury that he was not going to instruct them to find the defendant Not Guilty (Rec. 128), the erroneous instruction laying a basis for the jury to find defendant or his witnesses to be impeached on immaterial matters (Point V) could have no other effect, than to prejudice defendant with the jury and *turn them against him* as unworthy of belief and credence. Petitioner's right to a fair and impartial trial was violated and his liberty imperiled without due process of law.

IV.

The Exemption Extended by Congress to a Duly Ordained Minister of Religion Is Made to the Man Who Is Such and the Regulations Limiting that Exemption Are Void for Want of Power and as Involving the Judicial Field.

It stands admitted that on April 27, 1941, defendant was ordained as a minister and priest of God by a certificate of ordination and election by trustees and assigned to duty as an assistant minister of Christ Church II, Chicago (Deft.'s Ex. 5, Rec. 72); and that on March 23, 1942, he was further ordained a minister and priest of God in full rank authorized to solemnize marriage and perform other duties incident to the office of minister in His Service, the ordination as a full minister being effective March 23, 1942 (Deft.'s Ex. 8, Rec. 101). The validity of these documents is not challenged in this record except by innuendo and evidence tending only to cast suspicion upon them. That the church was functioning—though feebly perhaps, as all new church organizations in history have done,—is not to be doubted.

There was no attack made upon the church organization or charter or power to ordain a minister and the court did not give any instruction to the jury upon the subject of the validity of the certificate of ordination.

The exemptions of the clergy is provided in the Section 305 (d) of the Selective Training and Service Act and it reads:

> "(d) Regular or duly ordained Ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act shall be exempt from training and service (but not from registration) under this Act."

The question here is whether the defendant is a "duly ordained minister of religion." Of that fact there can be no question. Those are the words of the Congress that made the law. It is not to be added to nor subtracted from by any Board or person acting under authority of the Act.

The regulations issued in aid of the Act defines an ordained minister and at a glance it is seen that the regulation exceeds the law as made by Congress. A duly ordained minister is exempt. The question is whether he is duly ordained and nothing more. But the regulation reads:

> "A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; *and who customarily performs those duties.*" (Prentice-Hall 712, 3 (c).) (Italics for emphasis.)

Now Congress did not say that the duly authorized minister should be customarily performing the functions of the office or profession, and the party drafting the regulation had no power to go beyond the plain wording of the law.

There are other exemptions such as state officials and judges of the courts of record of the United States and of the several states "while holding such offices." (Sec. 305 (c) (1).) In those instances the exemption is to the office, *i.e.*, to the man while in that office and is because of the character of the service he is performing for government.

But the exemption to the duly ordained minister is a recognition to the *character of the person* who has been selected and authorized and commissioned by a church as a minister. The Act does not single out the particular church or religious sect of the many that exist and fix any particular standard or definition but made it general so as to apply to the ordained minister of every sect no matter what name designated, nor how humble the church or sect may be. The exemption is in perpetuity to the man.

In *Watson* v. *Jones*, 80 U. S. 679, the Supreme Court said on page 728, etc.:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine * * * is unquestioned."

The court is not authorized to challenge the records of a church or a certificate of ordination collaterally *no more than it can the records of the draft board when it has functioned and classified a registrant, yet here the court has done both.* The board classified the defendant and passed upon the defendant's exemption and so far as defendant is exempt the court has no power to interfere therewith. It cannot rule over the ordination of defendant unless it should be wholly void and without foundation in fact or law. But that is not the condition here.

The language of count 3 of the indictment is peculiar: "falsely assuming and pretending to *become* a minister of religion."

Now no one's motives can be challenged for wanting to occupy an office such as a mayor, a governor, a judge, upon the theory that he was seeking to evade military service. The motive is immaterial for it is supposed that such candidate expects to enjoy all the privileges and prerogatives of the office; and the same may be legally asserted as to a minister of religion and that is the normal expectation, else why the congressional exemption from military service.

The Statutes of Illinois provide a method of incorporating a religious society or church by filing an affidavit in the office of Recorder of Deeds in the form set out in the statute and that a certified copy of the recorded affidavit shall be received as evidence of the due incorporation of such church organization or society, and that it may change its name in like manner. Ch. 68, Sec. 164, 165, Rev. Stats, Ill.

The Illinois Statutes also provide that a minister of the gospel in regular standing in the church or so-

ciety to which he belongs "may solemnize a marriage." Ch. 89, Sec. 4, Marriages, Ill. Rev. Stats.

Thus the law of Illinois recognizes the church and invests a minister in good standing with power to officiate at weddings. Just as 305 (d) recognizes the minister in his character so does the Illinois statute except in Illinois the privilege is limited to good standing while under Section 305 (d) there is no limitation, the exemption goes to the office or character.

At the close of all the evidence the court should have directed a verdict. There was no substantial evidence of guilt in the record.

The indictment was not cured by the verdict, it was still bad after verdict.

V.

The Instruction Given by the Court to the Jury as to Disregarding the Entire Testimony of a Witness Who May Have Testified to Any Matter Material to the Issues, Except as Corroborated Was Error.

The court in the course of his instructions to the jury said:

> "If you believe from the evidence that any witness in this case has knowingly and wilfully testified falsely on this trial to any matter material to the issues in this case, then you are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated, if you find it has been corroborated, by other credible evidence, or by facts and circumstances proven on the trial."

At the conclusion of the charge to the jury, this occurred:

> The Court: Are there any objections or observation in respect to the charge as given by the Government?

Mr. Owen: None by the Government.

The Court: By the defendant?

Mr. Smith: Well, if the court please, I would like to particularly except to that instruction in which you instructed the jury that if they believe from the evidence that any witness testified falsely they have the right to totally disregard his testimony, except insofar as corroborated by other credible evidence and facts and circumstances in evidence, or something along those lines. I can't repeat it exactly.

The Court: What would you say is wrong with it?

Mr. Smith: It leaves the jury to determine what the facts were, whether they were material or immaterial. As I understand what the authorities have held, they have held that if you go into the facts on that question, you have to point out the material facts.

The Court: You may have your exception.

Mr. Smith: Exception.

This instruction has been repeatedly condemned in the Supreme Court of Illinois and the reason given is essentially one of convincing logic and has general application. In the case of *People* v. *Flynn*, 378 Ill. 351, the instruction read:

> "The jury are instructed that if they believe any witness has knowingly or wilfully testified falsely to any material fact in issue in this case, then the jury may entirely disregard the testimony of such witness as to such matters as testified to unless he or she has been corroborated with reference to those particular matters by other credible witnesses, or facts and circumstances proved on the trial." (p. 355.)

The criticism by the court was that the trial judge did not instruct the jury as to what the *material facts* in the case were, which left the jury in a position to determine that matter as a question of law.

The same instruction in substance was given in the case of *People* v. *Wells*, 380 Ill. 347, and there the court said concerning it:

> "Such an instruction has been many times condemned and held to be improper as it leaves the jury to determine the legal question as to what are material facts or essential elements of the crime charged."

In this case there were impeaching questions asked of defendant's witnesses and admissions made which may or may not have been material to the issues in the case and it might be as was remarked in *People* v. *Flynn* that the jury might have believed that the witnesses were impeached upon immaterial facts instead of upon material matters.

The attention of the court having been drawn to this instruction and the error in it commented upon, the defendant should not be prejudiced by the refusal of the court to properly instruct the jury in this regard. We think the error reversible.

VI.

The Defendant Was Prejudiced Before the Jury by the Statements of the Trial Judge.

At the conclusion of the arguments of counsel, the court stated that the court would recess until the next morning at which time he would instruct them as to the law. The court then commenced to make the usual formal admonitions to the jury that they should not discuss the case among themselves nor permit any other person to talk to them about the case. The court then said:

> "You may go now until 10 o'clock tomorrow morning.

"Ladies and gentlemen, counsel has made a motion to deny the motion and refuse the instruction.
"I have been requested to ask you, etc., etc." (Rec. 128.)

It is respectfully suggested that the mention of this matter by the Judge to the jury grievously prejudiced the defendant in the minds of the jury. Of course the emphasis and inflections of the voice of the jurist cannot be reproduced here, but the statement can be read with such inflection and emphasis as to make it appear that in the mind of the Judge the defendant was guilty and that for that reason the Judge was not denying the jury an opportunity to so find.

Just what the mental reactions of the jury were cannot be known and because the effect of the statement cannot be measured, the worst may be assumed.

At least this may be said about this communication from the Judge to the jury, although made in open court, it was in no sense a proper remark or communication. If it had been said by the judge to the jury outside of the presence of the defendant and his counsel, it would have undoubtedly been error. We think it makes no difference whether said in open court or in private. It was a communication made by the Judge to the jury upon a matter having nothing to do with the functions of the jury. It is suggested that this error destroyed all hope that the defendant might have had of an acquittal by the jury, and for that reason the error is serious and reversible.

VII.

The Attorney for the Government Was Permitted Over Objection to Make a Violent and Inflammatory Argument to the Jury Outside of the Issues of the Case.

The attorney for the Government was permitted, over objection, to make violent and inflammatory arguments to the jury concerning the German American Bund, Hitler,—incidental matters not issues and not tending to prove the issues in the case.

Mr. Owen, Assistant District Attorney, said:

> Now, do you believe that Wernecke is a disciple of Mr. Hitler? Do you believe that Mr. Wernecke belonged to the German American Bund and that he was interested in disseminating propaganda in this country through the Aryan Book Store as was testified to from the witness stand?
>
> Mr. Smith: May I interpose an objection to this sort of argument, if the Court please. It is highly inflammatory and unfair and outside the realm of the prosecution. It is entirely void of anything that has to do with this case at all.
>
> Mr. Owen: I am arguing the evidence, if the Court please.
>
> The Court: It is all in evidence. It is upon the question of intent.

Hitler's name was brought in evidence as having been mentioned by the defendant sometime between September 5, 1938, and April 5, 1939. Defendant testified that he was not a member of the German American Bund and the Government made no direct proof that he was; it showed only a statement of defendant that inferentially tended to indicate that he was; the statement was explained by the defendant. Defendant occasionally took care of a book store called the Aryan Book Store in which was sold, among other literature, books from the German Library of Information, a licensed bureau of in-

formation. This literature was said by Wernecke to be for the purpose of promoting Americanism and fighting Communism. This service of employment was about five years prior to the trial. These bits of evidence were wholly remote and did not tend to show an intent of any kind, much less to violate a law not then enacted. They served only as a basis for the inflammatory argument made by counsel for the Government. It was not a violation of the law in the years 1938 and 1939 to belong to the German American Bund or to sympathize with that nation, nor did it have any tendency to support the charges made in the indictment.

VIII.

The General Search of Defendant's Home and Seizure of Defendant's Papers in His Desk in His Bedroom at the Time of His Arrest on the Back Porch of the Dwelling House Were Unreasonable Acts and Violated His Constitutional Right to Be Free from Unreasonable Searches and Seizures.

On the trial of the case the Government tendered in evidence certain documents (Govt's Exs. 17 and 18), which were taken from the home of the defendant at the time of his arrest. When offered the defendant objected and the court heard the evidence as to the circumstances of the seizure, overruled the objection and the documents were received in evidence. That they were material is not disputable; that they were not contraband or the instrumentalities of crime is obvious.

There was no search warrant in the hands of the arresting officers. The defendant was arrested and handcuffed on the back porch of his home at 6250 North Wayne Avenue by an arresting officer who was in a group of F.B.I. men under authority of an arresting warrant.

Two of the officers in the group pushed on from the rear porch into the house proper and into the north bedroom, where the defendant's papers were found in his desk and seized.

The two F.B.I. men searched the rooms inside the house. Officer Hysteck searched the bedroom of defendant and called the attention of Officer Robe to the papers in question and they were seized and produced at the trial. The Government justified the search and seizure of the defendant's papers as "incidental to his arrest" (Tr. 39).

Thus the law point was made; and the question is whether such seizure of evidentiary documents may be considered as one that falls within the prohibitive rule fixed in the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

In *Veeder* v. *U. S.*, 252 Fed. 414, application was made to the District Court for a search warrant, the objective of which was to search an office for documents, the description of which showed them to be of a character which might have afforded evidence that a crime had been committed but which were obviously not contraband, *i. e.*, the means by which the crime charged was committed; and it was there held that collateral documents, evidentiary in nature only, could not be made the subject matter of a search warrant. There the Court said that the statute as to search warrants authorizes only the seizure of property that "was used as a means of committing a felony" and that

> "By exclusion therefore papers and documents which afford evidence that a felony has been committed, but which were not the means of committing it, are immune from seizure,"

and that

> "It is not every kind of property that may be seized under a search warrant."

As to the general protecttion of the Fourth Amendment, the Court further said:

> "One's person and property must be entitled in an orderly democracy to be protected both against mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike."

And further it was said:

> "One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious, not even by a distinterested officer of the law, unless he is armed with a search warrant."

In *U. S.* v. *Kirschenblatt*, 16 Fed. (2d) 202, the question is directly passed upon where the Government sought to justify search of an office and seizure of evidentiary or relevant documents in an office. There a search warrant was issued authorizing a search for liquor in Kirschenblatt's offices. Four officers made the search and found and seized a small amount of liquor; at the same time the officers arrested Kirschenblatt and seized a number of papers of various kinds.

In the *Kirschenblatt* case, as here in this case, the Government sought to justify the seizure "as an incident to the arrest" (p. 202). Obviously, as was said, the search warrant there used was not broad enough to cover the private papers, as it specified only liquor, the containers thereof and "property designed for the manufacture of liquor."

There the contention of the Government was stated by Judge Hand, the writer of the opinion, as follows:

> "The argument runs that, since a person arrested may be searched, and all documents found upon him may be kept, whatever their nature, and since the premises in which he is arrested may be searched for contraband as an incident to the arrest, the search so authorized must be as broad as the search of his person." (pp. 202-203.)

The court there held that the power to search the premises of a defendant and seize his papers

> "would not exist if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is at home." (p. 203.)

It was there pointed out that the point had not been then decided in the Supreme Court but from an analysis of the cases it was there decided that the language of the Supreme Court in *Gouled* v. *U. S.*, 252 U. S. 298, 309, was applicable:

> "They (search warrants) may not be used as a means of gaining access to a man's house or office or papers solely for the purpose of making search for evidence to be used against him in a criminal or penal proceeding."

The opinion then states that it is true that in the *Gouled* case no arrest was involved but that the language scarcely admits of limitation on that account. The court stated that the real difficulty in the case was in the application of the doctrine because a paper might be the very thing against which the law is directed, as is there instanced:

> "The forged note, the fraudulent prospectus, the policy slip, the written contract, if that be forbidden, the seditious broadside,—perhaps all these may be contraband and subject to seizure when found on the premises. But the whole of a man's correspondence, his books of account, the record of his

> business, in general, the sum of his documentary property—these, in our judgment, are as inviolate upon his arrest as they certainly are upon search warrant."

The court concluded:

> "We cannot agree that the power (to search and seize) extends beyond those (papers) which are a part of the forbidden act itself. It would be hazardous to attempt any definition; we shall not."

Later the *Kirschenblatt* case was to be cited with approval in *U. S.* v. *Lefkowitz*, 285 U. S. 452.

The point was later decided in the Supreme Court in *U. S.* v. *Lefkowitz*, 285 U. S. 452 (82 A. L. R. 775), where it appeared that Lefkowitz had an office consisting of an outer and an inner room, each with a desk. Lefkowitz was arrested in his outer office with a warrant charging conspiracy. The arresting officers then searched both offices and removed papers from both desks, waste baskets, closets, etc., for purposes of use for evidence. There the Supreme Court said:

> "Respondent's papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. * * * Here the searches were exploratory and general and made solely to find evidence of respondent's guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the act, the papers and other articles found and taken were in themselves unoffending. * * *
>
> "The papers seized in the instant case were in themselves not offending. They were taken for the sole purpose of getting evidence to convict the defendants of a crime with which they were charged."

It was there held that the rights of Lefkowitz under the Fourth and Fifth Amendments had been violated, and the *Kirschenblatt* case was cited with approval.

A few years later another case arose involving the point here under study, *U. S.* v. *Thompson and Craig*, 113 Fed. (2d) 643 (129 A. L. R. 1291), where it appeared that at the time the marshal arrested the defendants and after the arrest had been made, and in the presence of the defendant, two post office inspectors proceeded in the presence of the marshal to search the premises stating, as justification, that they had the right to search and seize whenever the Government was making an arrest.

There the Court reviewed the cases, and, upon the authority of the *Lefkowitz* case, and others there cited, reversed the cases and directed that a new trial be granted.

From all this it is seen that the documents here objected to were in no sense contraband. They had never been used for any purpose and were evidentiary in character only; useful only to corroborate the Government's evidence that defendant had returned one lesson only for grading. Hence, being merely *corroborative* evidence, there could be nothing in or about these documents that made or could make them contraband.

Hence the doctrine of *Veeder* v. *U. S.*, 252 Fed. 414, and of *U. S.* v. *Kirschenblatt*, 16 Fed. (2d) 202, *U. S.* v. *Lefkowitz*, 285 U. S. 452, and *U. S.* v. *Thompson*, 113 Fed. (2d) 643, apply here, for the documents seized were not such as at common law might be seized as the means of crime if found upon the body of an accused when arrested or in his immediate control.

And we might suggest that the highly trained legalistically minded officer-witness who searched and seized and who used the correct legal phrases in testifying, himself suggested the fact that exempts these documents from the power of seizure. He testified that, after passing into the house, and, on his authority being questioned by the mother of the defendant, he said:

> "I told her we had authority incidental to the arrest of the defendant Wernecke in the house. * * * We were looking for evidence; for all types of evidence that we thought were important to this case."

This statement clearly shows that the motive of the officer was to conduct a general search as one "incidental to arrest," as he styled it. In this case the motive governs for the officer says he entered the premises for the very purpose of making the type of search the Constitution says shall not be made.

The charge in the indictment was that defendant had made false answers in his questionnaire and had attempted to evade war service by falsely assuming and pretending to become a minister of religion. The questionnaire of defendant referred to the study of Christian Evidences at Moody Bible Institute and the significance of the envelopes and paper was that of the 54 envelopes which had been delivered to defendant 53 were seized, the inference being that only one envelope had been used; and that from November 1, 1940, to date of arrest only one lesson had been returned by defendant; thus giving support to the argument made by Mr. Finn to the jury that defendant's study at Moody Bible Institute was a step in a preconceived plan to evade service and that in four and one-half months he had returned only one lesson (Tr. 110-111).

Concluding the argument of this point, we respectfully suggest that, as Exhibits 17 and 18 were used in support of the Government's arguments as evidence of evasion of the draft, they cannot be said to have been immaterial or harmless. Being material and harmful, a fact not here disputable, and having been obtained as the direct result of a general search of defendant's home, and an arbitrary seizure, their receipt in evidence, and consideration by the jury, was an invasion of the defendant's Constitutional guaranty to be secure in his person, house, papers and effects against unreasonable search and seizure.

The error is reversible.

IX.

The Court Erred in Admitting Testimony of the Witnesses Healy and Strope for Purposes of Proving Intent, Their Testimony Being of Statements Said to Have Been Made Prior to the Selective Service Act.

Over objection of defendant the court permitted the Government to show by the witness Healy that in July, 1940, he talked with defendant at his farm and to say that "We National Socialists will have to do something and find ways and means of preventing induction into the army," and that defendant said that he was going to organize a church and that by organizing a church he and its members would be ministers and would not be inducted into the armed forces, and that defendant said in September, 1940, that he had made up his mind to go ahead with the church.

Also the court allowed over objection the witness Irma Strope to testify that while she was on the farm as an employe of defendant that defendant had said that he

did not want them to go to church; that religion was just a theory; that Hitler had no religion and that he, defendant, did not believe in it either.

These statements of those witnesses were made in 1938, 1939 and 1940, long before war was declared, and prior to the date of the Selective Service Act. They do not show any intent that fits into the charges in the counts in this indictment; they are said to have been put in evidence to show an intent to neglect to perform a duty created by a law that was not then in existence and the regulations for which did not exist.

We think it manifest error.

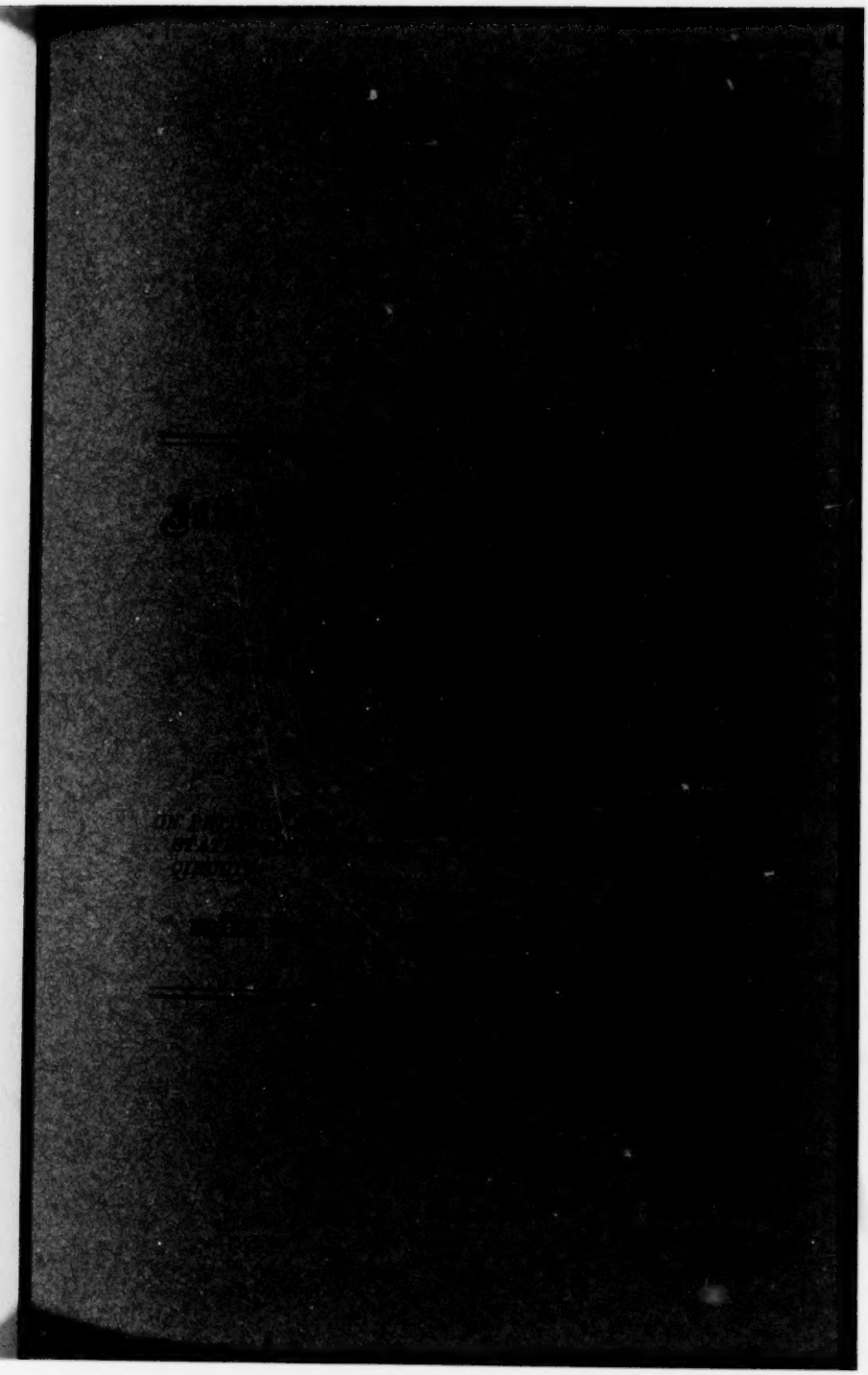
Conclusion.

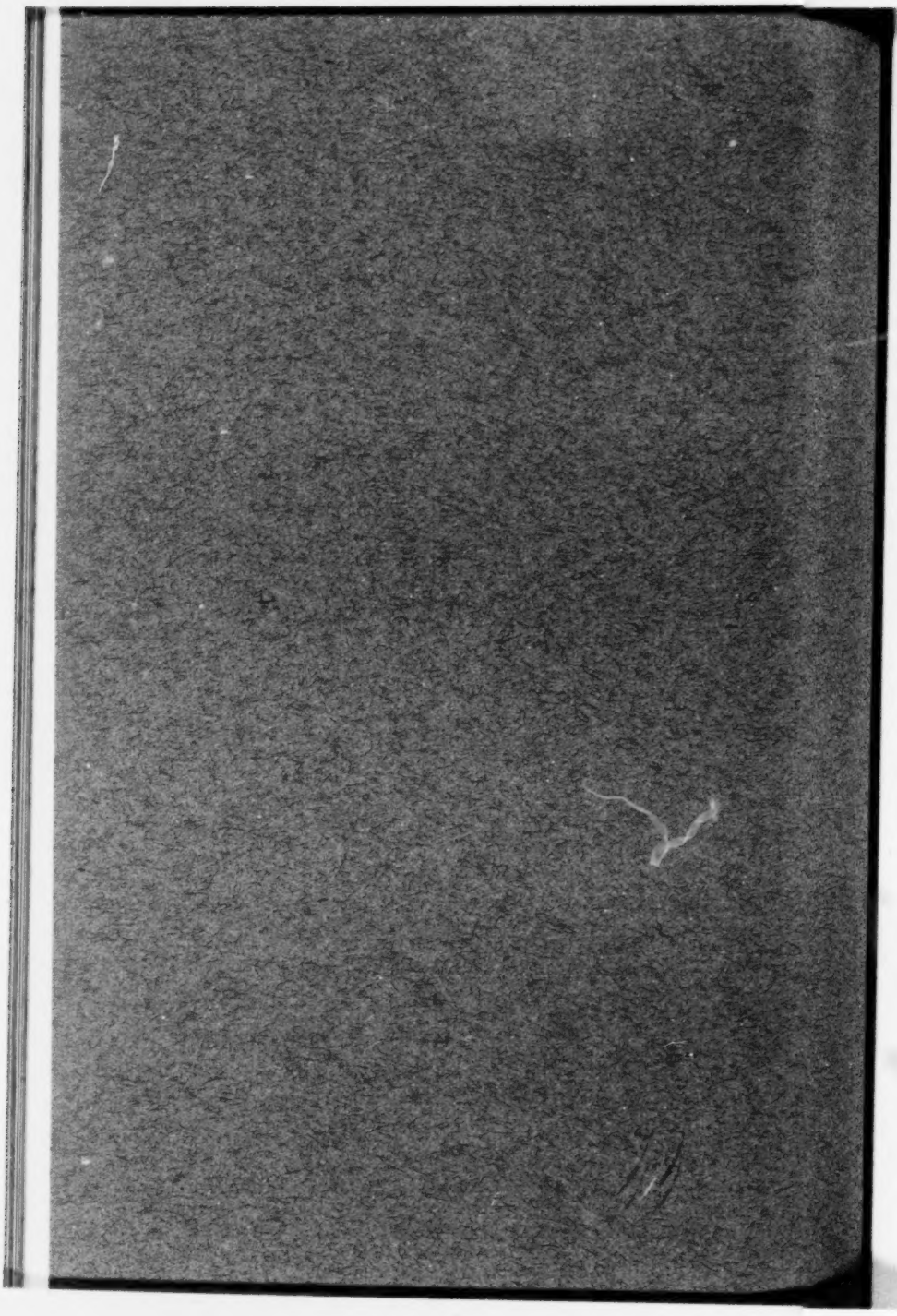
It is respectfully submitted that the record of this case discloses an important question of Federal law which has not been, but should be decided by this Court. Denial of due process of law and petitioner's right to his free exercize and enjoyment of religious profession and worship are alike here at stake.

For the reasons urged in this petition, it is urged that the Writ of Certiorari be granted and the findings of the lower courts reviewed.

Respectfully submitted,

Leo L. Donahoe,
Attorney for Petitioner.





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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 584

WILLIAM BERNARD WERNECKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 174–180) is reported at 138 F. (2d) 561.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 180) was entered November 5, 1943 (R. 180), and a petition for rehearing (R. 183–194) was denied December 2, 1943 (R. 203). The petition for a writ of certiorari was filed January 7, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules

XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment charges offenses under Section 11 of the Selective Training and Service Act of 1940 with sufficient particularity.

2. Whether, in a prosecution for draft evasion by fraudulently pretending to become a minister, the Government may challenge as fraudulent a certificate of ordination issued by an incorporated religious society.

3. Whether it was prejudicial error to admit in evidence exhibits taken from petitioner's home at the time of his arrest where the facts which the exhibits were designed to prove were established by other evidence and admitted by petitioner when he took the stand.

4. Whether, on a charge of evading service in the military forces by falsely assuming to be a minister of religion, it was proper to admit in evidence as bearing on the question of petitioner's intent, statements made by petitioner prior to the enactment of the Selective Training and Service Act.

5. Whether the prosecutor was guilty of misconduct in referring in his summation to evidence tending to show that petitioner had National Socialist sympathies.

6. Whether the trial judge's statement to the jury at the conclusion of the evidence that he had

denied a motion for a directed verdict was prejudicial to petitioner.

7. Whether the trial judge's instruction to the jury that if they believed that any witness had testified falsely on any material issue they were at liberty to disregard the entire testimony of that witness was improper.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of September 26, 1940, 54 Stat. 885, 894–895 (50 U. S. C. App. 311), provides in part as follows:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this

> Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, * * * or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

STATEMENT

Petitioner was indicted in the District Court of the United States for the Northern District of Illinois on three counts charging violations of Section 11 of the Selective Training and Service Act of 1940, *supra*. The first count charged that on May 12, 1941, petitioner, being a person charged with the duty of complying with the Selective Training and Service Act and the regulations thereunder, unlawfully, knowingly, and wilfully failed to perform the duty required of him under the Act and the regulations to make true and correct answers in the questionnaire executed by him on May 12, 1941, and made false and untrue answers therein (R. 2–3). The third

count[1] charged that on April 27, 1941, petitioner unlawfully, knowingly, and wilfully evaded and attempted to evade service in the land or naval forces by falsely assuming and pretending to become a minister of religion (R. 4).

After a trial by jury petitioner was convicted on the first and third counts (R. 151). Motions for a new trial and in arrest of judgment (R. 152–157) were denied, and petitioner was sentenced to five years' imprisonment and to pay a fine of $10,000 on each count, the prison terms to run concurrently and payment of the fine on one count to discharge the fines on both (R. 158). The judgment was affirmed on appeal (R. 180).

The evidence for the Government may be summarized[2] as follows:

Petitioner filed his Selective Service questionnaire with his local draft board on May 12, 1941 (R. 11, 15). He stated that he lived on his mother's farm and assisted in managing her farm and other property; that his mother was dependent upon him for management of the property although not for financial support (R. 10, 12). In the section of the questionnaire calling for a statement of his education, petitioner stated that

[1] The second count was dismissed on the motion of the Government at the close of the Government's case (R. 52).

[2] The evidence is summarized because there is no complete statement thereof either in the opinion below or the petition for a writ of certiorari. Also, petitioner contends, in effect (Pet. 42–46), that there was no substantial evidence of guilt as to the third count.

he had attended Central Y. M. C. A. college for three years, Moody Bible Institute for one year, and Christian Ministry College for six months (R. 9). Under Series VIII (questions to be answered by ministers or students preparing for the ministry) he stated that he was a minister of the Allied Christian Management Army and customarily served as minister; that he had been ordained on April 27, 1941, by Frederick Simpson Brown; and that he was then attending the Moody Bible Institute and the Christian Ministry College in Chicago (R. 10). Petitioner also claimed exemption as a conscientious objector from either combatant or noncombatant military service by reason of his religious training and belief (R. 10–11). In the space provided for additional statements by the registrant, petitioner wrote (R. 11):

> I believe that my induction should be deferred according to law because I am an ordained minister and at present a theological student.

Petitioner also attached to his questionnaire the statements of two physicians setting forth that he had certain physical defects (R. 12–13).

On the basis of the information contained in the questionnaire, petitioner's local board classified him on May 13, 1941, in Class IV–D, the classification for ministers of religion and divinity students (R. 12, 14–16).

In July 1940, petitioner had told a friend that "We National Socialists will have to do something. * * * We must them find ways and means of preventing induction into the armed forces of this country of our brother National Socialists" (R. 47). He said that the National Socialists should organize a church, and become ministers in order to avoid induction into the armed forces (R. 47–48). In August and September 1940 he stated to the same person that he intended to organize a church (R. 48). Before that time, in 1938 and 1939, he had told two employees at his mother's farm that he, like Hitler, did not believe in religion (R. 50).

On November 1, 1940, shortly after he had registered in the first draft registration in October of that year (R. 84), petitioner paid the fee and obtained the material used in a correspondence course conducted by the Moody Bible Institute of Chicago (R. 30). At the time of trial in June 1943 he had returned to the school for grading only one of the 54 lessons which constituted the course (R. 30, 31, 32, 82). On March 24, 1941, several weeks prior to filling out his questionnaire, he filed with the Institute an application for admission to the day school in which he stated that he was a member of the Lutheran Church (R. 21). In connection with this application he submitted a physician's statement at-

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testing to his good health (R. 21–22). He was accepted as a student on April 23, 1941 (R. 22), but never enrolled or registered and never attended classes in the school (R. 20, 22, 25, 82).

The Christian Ministry College, of which petitioner in his questionnaire claimed to have been a student (R. 9), "existed only on paper" (R. 59–60; see also R. 33–34). Martin Carlson, 79-year old "dean" of the college, who testified in petitioner's behalf, stated that he had never functioned in such capacity (R. 52, 57, 59–60). One Louis De Vries, another witness for petitioner testified that he had attended classes at the college (R. 63), but admitted, on cross-examination, that he knew very little about the college (R. 64) and that he had previously testified before the grand jury that he "never saw anything of it" (R. 63).

The Allied Christian Management Army, the Christian Ministry College, the American Mutual Consumers Association and the American Rangers all maintained headquarters in the same small office in Chicago and were all headed by Paul Richter (R. 33, 37, 55–56, 60). The "Army" and the consumer cooperative plan were part of the same project (R. 55, 60, 65, 70). Petitioner testified on cross-examination that he joined the "Army" "within a period of a few weeks one way or the other either before or after registra-

tion for the draft" (R. 84). Frederick Simpson Brown, "Bishop" of the "Army," by whom petitioner claimed to have been ordained (R. 10), testified that he had never been ordained as a minister; that the title of Bishop was conferred on him by Richter against his will; that he had never participated in any ceremony whereby petitioner was ordained as a minister; and that he had signed petitioner's *ad interim* and final certificates of ordination at Richter's request (R. 33–38, see R. 72, 101–102). Martin Carlson, who also signed petitioner's final certificate of ordination (R. 101–102),[3] could not remember having been present at any ceremony whereby petitioner was ordained (R. 56–58). Petitioner preached one sermon before five or six people in the office which constituted the headquarters of the various organizations named above (R. 36, 55), and once delivered a speech or sermon at the LaSalle Hotel (R. 37, 70–71). On cross-examination, petitioner stated that he had been ordained by God when he was twenty-one years old, but could remember no place or no person to whom he had preached (R. 84).

ARGUMENT

1. There is no merit in petitioner's contention (Pet. 32–37) that both counts on which he was convicted are fatally defective for vagueness and

[3] This certificate was not issued until after the filing of petitioner's questionnaire.

failure to inform him of the offenses charged.[4] The first count (R. 2–3) describes an offense within the language of the statute, i. e., failure to perform a duty required under the Selective Training and Service Act and the regulations thereunder, and it specifies the duty violated as being the duty to give true answers in the questionnaire filed by petitioner with his local board on May 12, 1942; it also specifically alleges that he made false and untrue answers to the questions contained in the questionnaire. Similarly, the third count (R. 4) charges in the terms of the statute the offense of evading service in the land or naval forces, and describes the date and means used as falsely assuming on April 27, 1941, to become a minister of religion.[5] The in-

[4] It should be pointed out that, as the Circuit Court of Appeals said (R. 175):

"No motion to quash or for a bill of particulars or a demurrer was filed by the defendant. At the conclusion of the Government's evidence, the defendant filed a motion for a directed verdict and also motions to strike each count of the indictment, but gave no reasons for the motions to strike."

Additionally, the question of the sufficiency of the indictment was not, specifically at least, raised in either of petitioner's motions for a new trial and in arrest of judgment (R. 141–146) or in his assignments of error filed in the trial court. (R. 160–162, 165–167.) The question is, however, considered in the opinion of the Circuit Court of Appeals (R. 175–176).

[5] Petitioner correctly states (Pet. 33) that Section 11 of the Act (*supra*, pp. 3–4) does not denounce an attempt to evade service, as the third count also alleges (R. 4). In his charge to the jury, however, the judge instructed that to convict they must find that petitioner evaded service, thus eliminating attempt as a ground for conviction (R. 135–136).

dictment, therefore, meets the tests by which its validity must be judged; it informs petitioner of the nature of the offense and protects him against further prosecutions for the same offenses. *Hagner* v. *United States,* 285 U. S. 427, 431–433; *Lamar* v. *United States,* 241 U. S. 103, 116; *Bersio* v. *United States,* 124 F. (2d) 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665; *United States* v. *Goldsmith,* 108 F. (2d) 917, 920–921 (C. C. A. 2), certiorari denied, 309 U. S. 678. The details of the offenses which petitioner now contends should have been alleged (Pet. 33–34) could have been sought by a motion for a bill of particulars. *Glasser* v. *United States,* 315 U. S. 60, 66; *United States* v. *Polakoff,* 112 F. (2d) 888, 890 (C. C. A. 2), certiorari denied, 311 U. S. 653. Having failed to make such a motion before trial, petitioner is in no position to rely upon his motions to strike at the close of the government's case (R. 52)[6] in support of his contention that he was prejudiced by the failure of the indictment to describe in greater detail the means used in committing the offenses. *Dunbar* v. *United States,* 156 U. S. 185, 192; *Keys* v. *United States,* 126 F. (2d) 181, 184 (C. C. A. 8), certiorari denied, 316 U. S. 694; *Capone* v. *United States,* 56 F. (2d) 927, 931 (C. C. A. 7), certiorari denied, 286 U. S. 553.

[6] These motions did not assert any ground for the action sought. See footnote 4, *supra*, p. 10.

2. Petitioner argues (Pet. 37–46) that since the Allied Christian Management Army was a duly organized religious corporation, the Government could not challenge its certification of petitioner as a minister. This contention relates to petitioner's conviction under the third count charging evasion of service by falsely assuming to be a minister. However, since the undisputed evidence in respect of petitioner's attendance and study at the Moody Bible Institute is alone sufficient to support his conviction under the first count for making false statements in his questionnaire (see Statement, pp. 4, 7–8, *supra*), and since the sentences under the two counts are concurrent (p. 5, *supra*), it is unnecessary to consider this contention. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105, and cases cited.[7] In any event, we think it is clear that just as a draft board is not bound by a religious sect's fiat that certain of its members are ministers,[8] the Government may

[7] Assuming that petitioner was exempt from service because of his claimed ministerial status, it is clear that this does not permit him to say that a false answer in respect of another claim for exemption is without influence or unimportant when made knowingly and with intent to mislead. *Kay* v. *United States*, 303 U. S. 1, 5–6; see also *Arnold* v. *United States*, 320 U. S. 212 (certiorari denied). Indeed, in this very case the evidence shows that upon the basis of his questionnaire petitioner was classified as exempt from service not only as a minister but as a divinity student (*supra*, p. 6).

[8] *Seele* v. *United States*, 133 F. (2d) 1015, 1021 (C. C. A. 8); *Buttecali* v. *United States*, 130 F. (2d) 172, 174 (C. C. A. 5); *Rase* v. *United States*, 129 F. (2d) 204, 208 (C. C. A. 6).

show that a purported ordination of a person as a minister was not authentic but was merely a fraudulent device to evade service. The evidence was clearly sufficient to justify the jury in finding that petitioner was never actually ordained; that he never intended to become and never actually served as a minister of religion; and that his certificate of ordination was spurious. His conviction under the third count was therefore proper.

3. Petitioner contends (Pet. 51–58) that Government Exhibits 17 and 18 should have been excluded on the ground that they were taken from his home as the result of an illegal search. The exhibits consisted of 53 manila envelopes and 147 sheets of blank ruled paper intended for use in answering the Moody Bible Institute correspondence school lessons (R. 45). The only fact which this evidence tended to prove was that petitioner did not return to the school 53 of the 54 lessons of his correspondence school course. This fact had previously been established by other evidence (R. 31, 32), and was later admitted by petitioner himself on cross-examination (R. 82). Hence, assuming that the question was properly preserved,[9] the admission of the exhibits, even if erroneous, was not prejudicial and does not constitute reversible error. *Edmondson* v. *United*

[9] See the discussion in the opinion below at R. 176–177, but cf. R. 66–67.

States, 80 F. (2d) 517, 518 (C. C. A. 5); *Dunlap* v. *United States,* 70 F. (2d) 35, 38 (C. C. A. 7), certiorari denied, 292 U. S. 653; *Kubik* v. *United States,* 53 F. (2d) 763, 766 (C. C. A. 8); *White* v. *United States,* 16 F. (2d) 870, 872 (C. C. A. 9), certiorari denied, 274 U. S. 745; *Libera* v. *United States,* 299 Fed. 300, 301 (C. C. A. 9); *Sharp* v. *United States,* 280 Fed. 86, 88 (C. C. A. 5), certiorari denied *sub nom Carollo* v. *United States,* 260 U. S. 730.

4. Petitioner argues (Pet. 38, 41, 58–59) that the court erred in permitting government's witness Irma Strope to testify that in 1938 and 1939 petitioner stated that he, like Hitler, did not believe in religion, and in allowing Raymond Healy to testify that in 1940 petitioner planned to organize a church as a means of preventing the induction of National Socialists into the armed forces (see Statement, *supra,* p. 7). Before Healy took the stand, the prosecutor announced that his testimony was to be restricted to the question of intent under the third count charging evasion of service (R. 46). And in his instructions to the jury, the trial judge charged that all testimony concerning statements made by petitioner prior to the dates set forth in the indictment was, if believed, to be considered by the jury only on the question of intent in relation to the charge of the third count (R. 135). So limited, the evidence was clearly admissible

as showing that petitioner's purpose in assuming to become a minister was to evade service as charged in that count. Cf. *Debs* v. *United States,* 249 U. S. 211, 215; *Williamson* v. *United States,* 207 U. S. 425, 451; *Allis* v. *United States,* 155 U. S. 117, 119; *Wood* v. *United States,* 16 Pet. 342, 360–361; *Viereck* v. *United States,* 130 F. (2d) 945, 959–960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley,* 132 F. (2d) 170, 180–181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States,* 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Herman* v. *United States,* 257 Fed. 601, 603–604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States,* 256 Fed. 805, 811–812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States,* 255 Fed. 301, 304–305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678.[10]

5. Petitioner contends (Pet. 41, 50–51) that the prosecutor was guilty of prejudicial misconduct in referring in his summation to petitioner as a "disciple of Mr. Hitler" and to petitioner's association with the German-American Bund and the Aryan Book Store (R. 124). Petitioner's National Socialist sympathies and his attitude toward Hitler were first mentioned by government witnesses Healy and Strope, whose testi-

[10] Moreover, as has been pointed out (*supra,* p. 12), petitioner's conviction may be sustained on the basis of the first count alone.

mony in that regard was, as we have shown (*supra,* pp. 14–15), properly admitted. When petitioner took the stand in his own behalf he stated on direct examination that he had never been a member of the National Socialist party (R. 78). On cross-examination he denied membership in the German-American Bund, but admitted that he had taken "care of" the Aryan Book Store (R. 79, 80). He was then shown and admitted writing a letter addressed to Mr. Talpey of the Pelley Publishing Company inquiring whether, if he were a member of the Bund, he could join the Silver Shirts (R. 80–81). Petitioner's attorney in his summation argued to the jury that petitioner was not a Bund member and also argued that petitioner's testimony to the effect that he felt that he had been ordained by God was worthy of belief (R. 115, 118). In rebuttal, the prosecutor called the jury's attention to the fact that Mrs. Strope had testified that in 1939 petitioner had stated that he did not believe in religion because Hitler did not believe in it (R. 123–124). The prosecutor then asked the rhetorical questions, copied in the petition for writ of certiorari, of which petitioner complains (Pet. 50) concerning petitioner's National Socialist sympathies (R. 124). Read in the light of this context, the prosecutor's statements constituted legitimate rebuttal and were based directly upon evidence. *United States* v. *Socony-Vacuum Oil Company,*

310 U. S. 150, 241–242; *United States* v. *Skidmore,* 123 F. (2d) 604, 610 (C. C. A. 7), certiorari denied, 315 U. S. 800; *Baker* v. *United States,* 115 F. (2d) 533, 544 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Comeriato* v. *United States,* 58 F. (2d) 557, 558 (C. C. A. 4), certiorari denied, 286 U. S. 566; *Rice* v. *United States,* 35 F. (2d) 689, 695 (C. C. A. 2), certiorari denied, 281 U. S. 730.

6. Petitioner also claims prejudice (Pet. 42, 48–49) because the trial judge, in dismissing the jury for the night, after argument of counsel had been completed, informed the jury that he had denied defense counsel's motion for a directed verdict (R. 128). In his charge the next morning the judge instructed the jury that, if he had at any time expressed an opinion on a matter of fact, it was their duty to disregard it; that they were the sole judges of the facts and of the credibility and weight to be given to the testimony of the witnesses (R. 129–130). Under these circumstances, the judge's remark that he had overruled the motion for a directed verdict, even if it be considered an expression of his opinion as to petitioner's guilt, would not constitute grounds for reversal. *Henry* v. *United States,* 273 Fed. 330, 336 (App. D. C.), certiorari denied, 257 U. S. 640; cf. *United States* v. *Murdock,* 290 U. S. 389, 394; *Quercia* v. *United States,* 289 U. S. 466, 469; *Horning* v. *District of Columbia,* 254 U. S. 135, 138, 139; *Allis* v. *United States,* 155 U. S. 117, 123;

Simmons v. *United States,* 142 U. S. 148, 155; *United States* v. *Goldstein,* 120 F. (2d) 485, 491 (C. C. A. 2), affirmed, 316 U. S. 114; *Marino* v. *United States,* 91 F. (2d) 691, 699 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States,* 302 U. S. 764.

7. Finally, petitioner complains (Pet. 46–47) of the trial judge's instruction that, if the jury believed that any witness had testified falsely to any material issue, they were at liberty to disregard the entire testimony of such witness. He argues that the instruction had the effect of submitting to the jury the determination of a question of law, i. e., the material issues in the case. However, the judge carefully defined the issues and admonished the jury to confine their deliberations to the questions submitted to them (R. 134, 136–137). Since the jury was left in no doubt as to what constituted the material issues in the case, the instruction complained of was proper. Similar instructions have been upheld in federal cases. *Mason* v. *United States,* 95 F. (2d) 612, 614 (C. C. A. 5); *Gordon* v. *United States,* 289 Fed. 552, 555 (App. D. C.); *Henry* v. *United States,* 273 Fed. 330, 338 (App. D. C.), certiorari denied, 257 U. S. 640.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of gen-

eral importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 584

WILLIAM BERNARD WERNECKE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition of William Bernard Wernecke for a Rehearing of the Judgment of the Supreme Court of the United States Herein, Rendered on the 7th day of February, 1944, Denying Said Petitioner Said Writ of Certiorari.

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The authorities cited by respondent do not support the lower court's judgment and opinion sustaining the Government's contention that petitioner "did evade or attempt to evade" service in the armed forces by "falsely assuming and pretending to become a minister of religion" (Count III of the indictment), nor dispose of petitioner's fundamental contention that the District Attorney's attack upon petitioner's ordination as a minister of religion; the ridicule and derision of his religious belief and doctrines by testimony of Government witnesses; inflammatory and improper argument to the jury; and conduct of the trial judge admitting improper evidence over objection, violated petitioner's rights and liberties guaranteed to him in Article II of the Bill of Rights of the Constitution of Illinois (1870) 7

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In The

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943.

No. 584

WILLIAM BERNARD WERNECKE,

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vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition of William Bernard Wernecke for a Rehearing of the Judgment of the Supreme Court of the United States Herein, Rendered on the 7th day of February, 1944, Denying Said Petitioner Said Writ of Certiorari.

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William Bernard Wernecke, petitioner in the above entitled application for a writ of certiorari

to the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, respectfully represents that he is aggrieved by the judgment of this honorable Court, rendered herein on the 7th day of February, 1944, denying to him said writ of certiorari.

Petitioner says that he duly filed his petition for said writ, and brief in support thereof, in this court on the 7th day of January, 1944; and that the Solicitor General duly accepted service of said petition, brief, and transcript of record upon respondent on, to wit, January 8, 1944; that the brief of respondent in opposition to the granting of said writ was filed on or about January 18, 1944, and copies thereof furnished to counsel on January 19, 1944; that the exact dates of such acceptance of service and filing of opposition brief by respondent's counsel are unknown to petitioner, but will be shown by the record thereof in the office of the clerk of this court; but no question is made or intended to be raised by petitioner as to whether respondent's brief was filed within the time prescribed therefor, and if not so filed petitioner waives any right it may have had or now has to object upon this ground to the filing or consideration thereof. But petitioner says that all events, between the time said brief reached the hands of petitioner's counsel and the time of the convening of this court and the presentation of said petition and briefs of counsel thereon for his consideration, it was impossible for petitioner's counsel to prepare and file a reply to respondent's brief, and that in fairness to petitioner he should be given opportunity to present his reply to said brief, for the consideration of this court before its judgment denying said writ of *certiorari* shall become foreclosed; this for the following reasons, among others:

That petitioner's contentions upon said application were:

1. An indictment must show upon its face that a crime has been committed by the defendant; the offense must be shown by facts put of record so the defendant may prepare for trial and have protection against double jeopardy and the court may see subject matter to be adjudicated, otherwise the indictment will not support the verdict thereon.

2. The Defendant was prejudiced before the jury by the statements of the trial judge.

3. The attorneys for the Government were permitted over objection to make a violent and inflammatory argument to the jury outside of the issues of the case.

4. The free exercise and enjoyment of religious profession and worship without discrimination, shall forever be guaranteed and no person shall be denied any civil (or political) right, privilege or capacity, on account of his religious opinion, is a Constitutional endowment given to Defendant-Petitioner by the Constitution of Illinois, and such was invaded and his liberty jeopardized by the conduct of the district attorneys and the trial judge.

5. The general search of Defendant's home and seizure of Defendant's papers in his desk in his bedroom at the time of his arrest on the back porch of the dwelling house were unreasonable acts and violated his Constitutional right to be free from unreasonable searches and seizures.

6. The instruction given by the Court to the Jury as to disregarding the entire testimony of a witness who may have testified to any matter material to the issues, except as corroborated, was error.

7. The exemption extended by Congress to a duly ordained minister of religion is made to the man who is such and the regulations limiting that exemption are void for want of power and as invading the judicial field.

8. The Court erred in admitting testimony of the witnesses Healy and Strope for purposes of proving intent, their testimony being of statements said to have been made prior to the Selective Service Act.

That in the brief for the Government, its counsel take the position that the decision below is clearly correct, because:

1. There is no merit in petitioner's contention that both points on which he was convicted are fatally defective for vagueness and failure to inform him of the offenses charged. To this point were cited numerous decisions in this Court, including some of those cited by the lower court in its opinion.

2. That even though petitioner argues that since the Allied Christian Management Army was a duly organized religious corporation, the Government could not challenge its certification of petitioner as a minister; that since the undisputed evidence in respect of petitioner's attendence and study at the Moody Bible Institute is alone sufficient to support his conviction under the first count for making false statements in his questionnaire and since the sentences under the 2 counts are concurrent, it is unnecessary to consider this contention.

3. That the admission of the exhibits claimed by petitioner to have been taken from his home as a result of an illegal search was not prejudicial and does not constitute a reversible error; citing many decisions of this Court.

4. That the evidence of Government witnesses, Irma Strope and Raymond Healy was clearly admissible as showing that petitioner's purpose in assuming to become a minister was to evade service as charged in that count. To this point, also were cited many decisions in this Court, and that of the U. S. Circuit Court of Appeals.

5. That the prosecutor's statements to the Jury complained of by the petitioner as violent, inflammatory arguments outside of the issue of the case, constituted legitimate rebuttal and were based directly upon evidence; citing decisions of this Court.

6. That the remarks of the trial judge asserted by the petitioner to be prejudicial did not constitute grounds for reversal even if it be considered an expression of his opinion as to petitioner's guilt; citing numerous decisions of this Court.

7. That the instruction to the Jury by the Court as to disregarding the entire testimony of the witnesses who may have testified to any matter material to the issues except as corroborated, complained by petitioner as error, was cured by the Court's finding the issues and admonishing the Jury to confine their deliberations to the questions submitted to them.

Petitioner respectfully presents herewith a note of argument in the nature of a reply to said opposition brief for respondent, and asks that it be read and considered in support of this petition; and for the reasons assigned in his original petition and supporting brief for the granting of said writ of certiorari, as well as those assigned herein, petitioner prays that his appli-

cation therefor may be reconsidered and reheard, and upon such rehearing granted, and the judgment and opinion complained of reviewed and reversed by this Honorable Court.

Respectfully,

WILLIAM BERNARD WERNECKE,
Petitioner.

By Counsel.

LEO L. DONAHOE,
LAURENCE B. JACOBS,
Counsel for Petitioner.

United States of America,
State of Illinois,
County of Cook, to-wit:

I, Laurence B. Jacobs, counsel for petitioner in the above entitled action and proceeding, do certify that the foregoing petition for a rehearing of the application for a writ of certiorari made therein is presented in good faith and not for delay.

Given under my hand this 1st day of March, 1944.

LAURENCE B. JACOBS.

NOTE OF ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

The authorities cited by respondent do not support the lower court's judgment and opinion sustaining the Government's contention that petitioner "did evade or attempt to evade" service in the armed forces by "falsely assuming and pretending to become a minister of religion" (Count III of the indictment), nor dispose of petitioner's fundamental contention that the District Attorney's attack upon petitioner's ordination as a minister of religion; the ridicule and derision of his religious belief and doctrines by testimony of Government witnesses; inflammatory and improper argument to the jury; and conduct of the trial judge admitting improper evidence over objection, violated petitioner's rights and liberties guaranteed to him in Article II of the Bill of Rights of the Constitution of Illinois (1870).

In submitting this note of argument for consideration by the Court, petitioner will disregard all other errors complained of (for the purpose of this argument) and will rely solely and entirely upon the questions presented and answered by respondent under Point II.

Respondent's argument and authorities presented regarding petitioner's answers to questions relating to his attendance and study at the Moody Bible Institute (Respondent's Brief, p. 12) are not borne out by the Record herein filed. Here respondent has stated that "since the undisputed evidence in respect of petitioner's attendance and study at the Moody Bible Institute is alone sufficient to support his conviction under the first count for making false statements in his questionnaire, and since the sentences under the two counts are concurrent, it is unnecessary to consider this contention".

The actual facts are as follows (Rec. 14-16): Mark Neville, Secretary and member of petitioner's Selective Service Board, stated that petitioner was classified as 4-D, an ordained minister or divinity student of a recognized divinity school (Rec. 14). Mr. Wernecke stated that he was a Minister and gave the date on which he became a Minister. It is obligatory for registrants to sign every portion of the questionnaire in so far as it in any wise pertains to them or their activities. Under the law, we could have placed the defendant Wernecke in Class 4-D either for being a Minister or being a theological student. The claim of the defendant Wernecke of being a Minister would have placed him in Class 4-D. The Board took into consideration the answers both as to being a theological student and *an ordained minister* (our italics) in making our classification.

The true intent of the Selective Service Board is here shown by the positive statement of the Secretary and Member of the Board that "the claim of the defendant Wernecke of being a Minister would have placed him in Class 4-D". The record is bare of any evidence that petitioner was placed in Class 4-D as being exempt under the claim that he was a theological student.

The citation offered by the Government (320 U. S. 81) referring to a person convicted on two counts to run concurrently, it is unnecessary on review to consider the validity of the sentence on one of the counts if that, or the other is sustainable, would not apply on this case. If the ordination of the defendant was legal, then the other count in his indictment would necessarily fall because he did not claim exemption on the ground of being a divinity student, and only sets forth some of the activities in which he was engaged to qualify

him to better administer his duties as a duly ordained minister of religion.

The fact that this matter has not been directly passed upon by the Court makes it imperative that the law should be settled regarding the manner of voiding the selectee's classification.

Respondent contends (Resp.'s Brief 12) that it is clear that just as a draft board is not bound by a religious sect's fiat that certain of its members are ministers, the Government may show that a purported ordination of a person as a minister was not authentic but was merely a fraudulent device to evade service. The whole case, therefore, revolves about the question "Whether or not Courts may review a classification or denial of an exemption already settled and determined by the Selective Service Board", and furthermore, "Whether or not, upon a criminal proceeding actually raising these issues, the Government may attempt to show, by testimony regarding defendant's alleged acts and statements months before Pearl Harbor or before the enactment into law of the Selective Service and Training Act of 1940, it was his intention to evade the operation of a Federal law, not then even in existence, by organizing a church and falsely pretend to become a Minister of religion, that he might evade service in a non-existent and undeclared war."

As well might it be said that a man's statements or speculations bearing upon his consideration of what laws *might be* or *could be enacted* in the future may be a lawful test to establish an unbroken continuity of *criminal intent* to evade the just and lawful provisions of a Federal enactment dealing with a similar subject matter, when, as, and if, the same were later made into law.

The record shows (Rec. 101) that William B. Wernecke was duly ordained as a minister of religion by the Allied Christian Management Army (Rec. 98), a duly qualified religious sect under the laws of the State of Illinois. The question to be determined by the Court is whether that ordination can be attacked collaterally.

In the Selective Service and Training Act, it is stated that no recourse to the Courts for relief may be granted. Therefore, if the ordination of a minister could be attacked collaterally, then no minister of religion could be assured that his status was defined.

All persons under the Selective Service Act stand in the same light and are measured by the same standards and no one should be treated any differently because of his affiliations or actions.

The Government in their trial, raised many inferences that petitioner William B. Wernecke was associating with persons and with the Bund, who it is claimed were acting in an unpatriotic and seditious manner. Unless his ordination can be attacked collaterally, these inferences raised by the Government were erroneous and prejudicial. We contend that the Government has no right to question this ordination in the Courts. If the Selective Service and Training Board had called Wernecke in for re-classification and had put him in Class 1-A, and he had then stood in defiance of the Board, he would have then brought himself within the purview of some of the cases cited by the Government. All of the cases cited as follows:

Cf. *Debs.* v. *United States,* 249 U. S. 211, 215; *Williamson* v. *United States,* 207 U. S. 425, 451; *Allis* v. *United States,* 155 U. S. 117, 119; *Wood* v. *United States,* 16 Pet.

342, 360-361; *Viereck* v. *United States,* 130 F. (2d) 945, 959-960 (App. D. C.), reversed on other grounds, 318 U. S. 236; *United States* v. *Pelley,* 132 Fed. (2d) 170, 180-181 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Schoborg* v. *United States,* 264 Fed. 1, 7 (C. C. A. 6), certiorari denied, 253 U. S. 494; *Herman* v. *United States,* 257 Fed. 601, 603-604 (C. C. A. 9), certiorari denied, 251 U. S. 558; *Coldwell* v. *United States,* 256 Fed. 805-811-812 (C. C. A. 1), certiorari denied, 250 U. S. 661; *Kirchner* v. *United States,* 255 Fed. 301, 304-305 (C. C. A. 4), certiorari dismissed, 250 U. S. 678, were either where the selectee had been called for service and had stood in defiance of the order of the Board or where they were engaged in espionage or subversive activities. This is clearly not the position of the defendant in this case, as he did not stand in defiance of any order, nor was he engaged in any activity that was considered subversive. Petitioner claims that the Government has no right to question his ordination in the Courts as long as it was done in accordance with Section C of the Selective Training Service Act of September 16, 1940, which provides: "A duly ordained minister of religion is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization to preach or teach its doctrines, and to administer its rights and ceremonies in public worship; and who customarily performs those duties."

Under the provisions of the Selective Service Board's authority, they should have recalled the defendant and reclassified him *if there had been any doubt in their mind about the legality of his ordination.* (Our italics.) Not having done so, it is contended that the ordination cannot now be legally voided by the action of the Court.

This doctrine is well settled in the cases of *Checinski* v. *United States* (129 Fed. (2d) 461, 462)* and *Seele* v. *United States* (133 Fed. (2d) 1015, 1023)**.

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* In *Checinski* v. *United States,* the Circuit Court of Appeals said:

> "The only substantial difference between the procedure here followed by the court from that in the *Rase* case, is that the court narrowed the issues holding that under the terms of the law he could not review the evidence presented to the draft boards but could consider only the draft board records, and that in the absence of proof that there was any failure by the boards to consider the evidence presented, or any failure to give the registrants a full and fair hearing, he was without power to review the classification made. There being no such evidence he made a finding of guilt in each of the cases and imposed sentence upon each of the appellants.
>
> (1) The conclusion reached in the *Rase* case that no review of the findings of local draft boards is by the law committed to the courts and that relief may be granted the registrants only when the local board has acted arbitrarily and capriciously and without evidence, is reaffirmed here."

**To the same effect the Circuit Court of Appeals stated in its opinion in *Seele* v. *United States*:

> "It is true that appellant has exhausted such administrative remedies, but it is the generally accepted rule that, under the Selective Training and Service Act, no review of findings of Local Draft Boards upon any classification or the denial of an exemption is committed to the courts, and relief may be granted the registrant only when the Local Draft Board has acted arbitrarily and capriciously and without substantial evidence. *Johnson* v. *United States,* 8 Cir., 126 F. 2d 242; *Rase* v. *United States,* 6 Cir., 129 F. 2d 204; *United States* v. *Grieme,* 3 Cir., 123 F. 2d 811, and many others.

"This is in accord with the pronouncement of the Supreme Court that where the decision of a Director is final and conclusive on any specific matter under an Act, it is not subject to judicial review, 'at least unless the decision be wholly unsupported by evidence, wholly dependent upon a question of law, or clearly arbitrary or capricious'. *Silberschein* v. *United States,* 266 U. S. 221, 45 S. Ct. 69, 69 L. Ed. 256."

All of which is respectfully submitted.

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